Supreme Court, U.S.
FILED
04 176 AUG - 3 2004
OFFICE OF THE CLERK

No. 04-

IN THE

Supreme Court of the United States

JAMES D. MINCH, RICHARD A. GRAF,
and RICHARD COSENTINO,

Petitioners,

-and-

DONALD DRNEK,

Petitioner,

v.

CITY OF CHICAGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

CLINTON A. KRISLOV
Counsel of Record
MICHAEL R. KARNUTH
KRISLOV & ASSOCIATES, LTD.
Civic Opera Building,
Suite 1350
20 North Wacker Drive
Chicago, Illinois 60606
(312) 606-0500

RONALD L. FUTTERMAN
JOAN MATLACK
WILLIAM THOMAS
FUTTERMAN & HOWARD,
CHARTERED
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603
(312) 427-3600

Attorneys for Petitioners

188788

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. What actions did Congress intend to prohibit when it carved out an exception in the exemption set forth at 29 U.S.C. § 623(j) of the Age Discrimination in Employment Act for action taken that is a "subterfuge to evade the purposes of this Chapter?"

2. Does the exemption set forth at 29 U.S.C. § 623(j) of the Age Discrimination in Employment Act permit public employers to discharge firefighters and law enforcement officers on the basis of age for reasons other than public safety?

3. Is it permissible for public employers to be given "safe harbor" under the exemption set forth at 29 U.S.C. § 623(j) of the Age Discrimination in Employment Act when they are motivated to discharge older firefighters and police officers because of arbitrary age discrimination or because they are using the discharge to foster greater diversity in their work force?

4. In applying the public safety exemption set forth at 29 U.S.C. § 623(j) of the Age Discrimination in Employment Act, permitting a mandatory retirement program for firefighters and law enforcement officers that is not a "subterfuge to evade the purposes of the chapter," may subterfuge be shown by evidence that the mandatory retirement program is motivated by intent to evade ADEA § 623(a)(1)'s prohibition against discriminatory discharge, or can subterfuge only be shown by evidence that the employer was motivated by intent to evade a *different* substantive prohibition of the ADEA?

5. Who bears the burden of proof on the issue of whether an employer's actions should be given "safe harbor" under the exemption?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table Of Contents	ii
Table Of Cited Authorities	v
Table Of Appendices	ix
Opinions Below	1
Jurisdiction	2
Federal Rules Of Civil Procedure Involved	2
Statutes Involved	2
Statement Of The Case	6
A. The ADEA's Public Safety Exemption	7
B. Petitioners	8
C. Course Of Proceedings Below	8
1. Proceedings In The District Court	8
2. The Seventh Circuit's Opinion	10
D. Statement Of Facts	11

Contents

	Page
Reasons For Granting The Petition	12
I. Introduction	12
II. The Seventh Circuit's Decision Creates A Split Among The Circuit Courts On How Subterfuge Is Determined And On Whose Burden The Issue Rests	14
III. The Case Presents Important Questions Of Federal Law That Need To Be Resolved By This Court	17
A. Fostering Diversity In The Ranks Of Fire And Police Departments Is Not A Lawful Purpose For The Mandatory Retirement Of Older Firefighters And Police Officers	17
B. The Seventh Circuit's Decision Disregards The Intent Requirement That Congress Made Explicit In The Section 623(j) Exemption	18
C. The Seventh Circuit's Decision Is In Conflict With The Plain Language Of The 623(j) Exemption And The Public Safety Purposes For Which It Was Intended	20

Contents

Page

IV. The Seventh Circuit's Decision Conflicts With This Court's Decision In *Public Employees Retirement System Of Ohio v. Betts* And Represents A Profound Departure From The Usual Course Of Judicial Proceedings, Creating A Compelling Need For This Court To Exercise Its Supervisory Powers 23

Conclusion 28

TABLE OF CITED AUTHORITIES

Page

Cases:

Arnold v. Ben Kanowsky, Inc., 361 U.S. 388 (1960) 26

Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438 (2002) 20

Bethesda Hospital Ass'n v. Bowen, 485 U.S. 399 (1988) 20

Bridewell v. Cincinnati Reds, 155 F.3d 828 (6th Cir. 1998) 26

Chapman v. Houston Welfare Rights Organization, 441 U.S. 600 (1979) 20

Drnek v. City of Chicago, 192 F. Supp. 2d 835 (N.D. Ill. 2002) 1

Drnek v. City of Chicago, 205 F. Supp. 2d 894 (N.D. Ill. 2002) 1

Equal Employment Opportunity Commission v. Home Ins. Co., 672 F.2d 252 (2d Cir. 1982) 13, 14, 15, 16, 17

Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226 (1983) 7

Cited Authorities

Page

Johnson v. City of Columbia, S.C., 949 F.2d 127 (4th Cir. 1991) 26

McKennon v. Nashville Banner Pub. Co., 513 U.S. 352 (1995) 26

Minch v. City of Chicago, 363 F.3d 615 (7th Cir. 2004) 1

Morrissey v. Boston Five Cents Savings Bank, 54 F.3d 27 (1st Cir. 1995) 26

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 26

Passer v. American Chemical Society, 935 F.2d 322 (D.C. Cir. 1991) 26

Public Employees Retirement System v. Betts, 492 U.S. 158 (1989) ..... *passim*

Stuart v. UNUM Life Insurance Co. of America, 217 F.3d 1145 (9th Cir. 2000) 26

United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) 19

Whittlesey v. Union Carbide Corp., 742 F.2d 724 (2d Cir. 1984) 26

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) 18

Cited Authorities

Page

Statutes:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1292(b) 10

28 U.S.C. § 1331 2

29 U.S.C. § 621 ..... 1, 6

29 U.S.C. § 621(b) 2, 20, 23

29 U.S.C. § 623 6

29 U.S.C. § 623(a) 3

29 U.S.C. § 623(f) 14

29 U.S.C. § 623(j) ..... *passim*

29 U.S.C. § 626 2

29 U.S.C. § 631(c) 25

Age Discrimination in Employment Act Amendments of 1996, Pub. L. No. 104-208, § 1, 110 Stat. 3009-23 to 3009-25 (1996), subsec. 2(d)(2) 5, 6, 7, 21

Older Workers Benefit Protection Act, Pub.L. No. 101-433, 104 Stat. 978 (1990) 27

Chicago Municipal Code § 2-152-140 (rev. 2000) ... 6

Cited Authorities

Page

Rules:

Federal Rule of Civil Procedure 12(b)(6) 2

Legislative History:

141 Cong. Rec. H3822-01 (March 28, 1995) 23

142 Cong. Rec. S11922-01 (September 30, 1996) ... 23

Secondary Authority:

McDougal, Lasswell and Chen. *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination*, 28 U. Fla. L. Rev. 639 (1976) 18

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Seventh Circuit Decided April 9, 2004 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The Northern District Of Illinois, Eastern Division Dated May 22, 2002 ..... 33a

Appendix C — Memorandum Opinion And Order Of The United States District Court For The Northern District Of Illinois, Eastern Division Dated March 25, 2002 ..... 45a

Appendix D — Order Of The United States Court Of Appeals For The Seventh Circuit Denying Petition For Rehearing Dated May 5, 2004 ..... 80a

Petitioners James D. Minch, Richard A. Graf, Richard Cosentino, and Donald Drnek respectfully request the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit overturning the order of the United States District Court for the Northern District of Illinois denying dismissal of Petitioners' claims of age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*

OPINIONS BELOW

The Opinion of the Court of Appeals for the Seventh Circuit, on which petitioners pray for certiorari, is reported at *Minch v. City of Chicago*, 363 F.3d 615 (7th Cir. 2004), and is reprinted in the appendix hereto at App. A.

The Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division (Bucklo, J.), denying the City's motion to reconsider its March 25, 2002 Opinion and Order, and certifying a question for immediate interlocutory appeal to the Seventh Circuit Court of Appeals, is reported at *Drnek v. City of Chicago*, 205 F. Supp. 2d 894 (N.D. Ill. 2002), and is reprinted in the appendix hereto at App. B. The Opinion and Order of the United States District Court for the Northern District of Illinois, Eastern Division (Bucklo, J.), granting in part and denying in part the City's motion to dismiss, is reported at *Drnek v. City of Chicago*, 192 F. Supp. 2d 835 (N.D. Ill. 2002), and is reprinted in the appendix hereto at App. C.

The unpublished Order of the Court of Appeals for the Seventh Circuit denying Petitioners' request for rehearing is reprinted in the appendix hereto at App. D.

JURISDICTION

The Opinion of the Seventh Circuit Court of Appeals was entered on April 9, 2004. Petitioners' timely request for rehearing and *en banc* review was denied on May 5, 2004.

Jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was based on 28 U.S.C. § 1331 (federal question) and 29 U.S.C. § 626 (Age Discrimination in Employment Act).

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides that a party may move for the dismissal of a pleading for "failure to state a claim upon which relief can be granted."

STATUTES INVOLVED

Section 621(b) of the Age Discrimination in Employment Act provides:

> It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Section 623(a) of the Age Discrimination in Employment Act, in relevant part, provides:

> It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

Section 623(j) of the Age Discrimination in Employment Act provides:

> (j) Employment as firefighter or law enforcement officer
>
> It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken —

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained —

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of–

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

Section 2(d)(2) of the 1996 Amendments to the Age Discrimination in Employment Act provides in relevant part:

> Subsection 2. Study and Guidelines for Performance Tests
>
> (c) Advisory guidelines.—Not later than 4 years after the date of enactment of this Act, the Secretary shall develop and issue, based on the results of the study required by subsection (a), advisory guidelines for the administration and use of physical and mental fitness tests to measure the ability and competency of law enforcement officers and firefighters to perform the requirements of the jobs of the officers and firefighters.
>
> (d) Job performance tests. —
>
> (1) Identification of tests.—After issuance of the advisory guidelines described in subsection (c), the Secretary shall issue regulations identifying valid, nondiscriminatory job performance tests that shall be used by employers seeking the exemption described in section 4(j) of the [ADEA] with respect to firefighters or law enforcement officers who have attained an age of retirement described in such section 4(j).
>
> (2) Use of tests.—Effective on the date of issuance of the regulations described in paragraph (1), any employer seeking such exemption with respect to a firefighter or law

> enforcement officer who has attained such age shall provide to each firefighter or law enforcement officer who has attained such age an annual opportunity to demonstrate physical and mental fitness by passing a test described in paragraph (1), in order to continue employment.

As explained in the "Historical and Statutory Notes" appended to 29 U.S.C. § 623, due to an apparent typographical error, section 2(d)(2) (cited above) is erroneously referred to as section 3(d)(2) in the body of the codified statute (*See* 29 U.S.C. § 623(j)(1)). Petitioners refer to section 2(d)(2) as section 3(d)(2) throughout this petition, in order to be consistent with the language of the statute and to avoid further confusion.

STATEMENT OF THE CASE

Petitioners, two police officers and two firefighters, were forced to retire by their employer, the City of Chicago ("City"), under an age-63 Mandatory Retirement Ordinance, Chicago Municipal Code § 2-152-140 (rev. 2000) ("MRO"), which was passed by the Chicago City Council on May 17, 2000, and became effective on December 31, 2000. [App. A, 9a n.5.]

Petitioners sued the City, both individually and on behalf of a class consisting of all Chicago firefighters and police officers subject to the MRO, on multiple claims, including age discrimination. Petitioners' age discrimination claims rest on their contention that the City enacted and implemented the MRO as a subterfuge to evade the purposes of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*

This case raises an issue of first impression for this Court, involving the proper scope of an ADEA exemption set forth at 29 U.S.C. § 623(j) which permits municipalities, under specifically-defined circumstances, to impose age-based restrictions in hiring and firing for police officers and firefighters ("public safety employees.")

A. The ADEA's Public Safety Exemption

Following this Court's holding in *Equal Employment Opportunity Commission ("EEOC") v. Wyoming*, 460 U.S. 226 (1983) that the ADEA applied to local governments, which opened local laws establishing retirement ages for public safety employees to challenge, Congress responded in 1986 by amending the ADEA to allow municipalities to enforce age restrictions regarding public safety employees that had been in place as of the day after *EEOC v. Wyoming* was decided. The 1986 amendment expired by its own terms on December 31, 1993.

In 1996, Congress retroactively reinstated the 1986 amendment, with modifications. The 1996 ADEA amendments allow age restrictions for hiring or firing public safety employees if "the employer has complied with section 3(d)(2) of the [ADEA] Amendments of 1996." 29 U.S.C. § 623(j)(1). Section 3(d)(2) charged the Department of Health and Human Services ("HHS") with developing fitness tests that would, once implemented, be offered to public safety employees as a threshold requirement before they could be subjected to mandatory retirement. Pub. L. No. 104-208, § 1, 110 Stat. 3009-23 to 3009-25 (1996). (To Petitioners' knowledge, HHS has never developed these fitness tests.) The public safety exemption also contains an exception requiring that a municipality's implementation of a

mandatory retirement scheme must be taken "pursuant to a bona fide . . . retirement plan *that is not a subterfuge to evade the purposes of [the ADEA]*." *Id.* at (j)(2) (emphasis supplied). It is the interpretation of this subterfuge language that is primarily at issue in this case.

B. Petitioners

Petitioners Donald Drnek and Richard Cosentino were employed by the City as police officers. Petitioners James D. Minch and Richard A. Graf were employed by the City as firefighters. All four petitioners had attained age 63 on or before December 31, 2000, and were forced to retire through the City's enforcement of its MRO, which went into effect on that date. Subsequently, Drnek filed an individual complaint, and Minch, Cosentino and Graf filed a class action complaint, in the United States District Court for the Northern District of Illinois.

C. Course Of Proceedings Below

1. Proceedings In The District Court

In the District Court, Petitioners made multiple substantive allegations; two are germane to the instant appeal. Petitioners alleged that: (1) the MRO violated the ADEA's substantive provisions by discriminating against Petitioners in "compensation, terms, conditions, or privileges of employment" and depriving them "of employment opportunities" adversely affecting their "status as an employee" because of their age; and (2) the MRO violated § 623(j) of the ADEA, as it is a subterfuge to evade the ADEA's purposes because, among other reasons, it was passed for the purpose of hiring and promoting younger

police officers and firefighters and not for public safety purposes, and under the exemption, the City's action could not be tainted by improper discriminatory motives. [Minch R. 1, 9; Drnek R. 6, 5.]

On June 8, 2001, the City moved to dismiss Petitioners' complaints, asserting that the MRO could not be a subterfuge of the ADEA. [Minch R. 7, 9; Drnek R. 10, 9.] On March 25, 2002, the District Court denied the City's motion to dismiss. [App. C, 45a-79a.] The District Court held that Petitioners had sufficiently alleged subterfuge with their allegations that the MRO was passed for reasons that violate the ADEA's purposes. [App. C, 60a-68a.] The Court also held that even if the MRO expressly included "public safety" as its stated purpose, the MRO, if it is to qualify for the § 623(j) exemption, can be tainted by no impermissible purposes. [App. C, 65a.] Finally, the Court ruled that an analysis into the motivation of legislators and other City officials in passing the MRO is relevant to Petitioners' subterfuge claim. [App. C, 64a.] With respect to this last point, the District Court reasoned:

> [T]he intent or desire of alderman or other City officials is both relevant and material. A subterfuge analysis, like a pretext analysis under a traditional *McDonnell Douglas*-style analysis, necessarily requires the trier of fact to look beyond the defendant's statement of purpose or intent to see whether it is just an excuse or an "artifice of evasion" to cover up otherwise prohibited conduct.

[App. C, 64a.]

On April 4, 2002, the City moved for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). [App. B, 34a.] The District Court elected to treat the City's motion in part as a motion for reconsideration. [App. B, 34a.] On May 24, 2002, the District Court denied the City's motion for reconsideration, noting that the City's theory regarding the "subterfuge" exception would render the subterfuge prong "if not dead, at least moribund." [App. B, 40a.] Specifically, the District Court noted that:

> Section 623(j) only applies if a mandatory retirement plan both meets the age requirements in § (j)(1) *and* is not a subterfuge under § (j)(2). The City's interpretation . . . that facial compliance with (j)(1) precludes me from looking elsewhere for evidence of subterfuge, would eviscerate the requirement that the plan not be a subterfuge.

[App. B, 41a-42a (emphasis in original).]

While the District Court rejected the certified question proposed by the City, it *sua sponte* certified its own question for interlocutory review: "whether a plaintiff can demonstrate subterfuge under § 623(j)(2) with *any* kind of evidence if there is no violation of § 623(j)(1)." [App. B, 43a (emphasis in original).]

2. The Seventh Circuit's Opinion

On interlocutory appeal, the Seventh Circuit reversed the District Court's denial of the City's motion to dismiss. Rejecting Petitioners' assertion that the City's actions in

promulgating the MRO for reasons other than legitimate public safety reasons violated the ADEA, the Seventh Circuit held that the subterfuge exception set forth at 29 U.S.C. § 623(j)(2) does not prohibit mandatory retirement of public safety officers by a municipality, provided the mandatory retirement is not being used to violate the ADEA's substantive prohibitions which are directed at conduct *other* than hiring and firing. [App. A, 29a.] Because Petitioners have alleged that the City's MRO was passed for reasons other than public safety, but have not pleaded that the City's actions violate any of the other "substantive provisions" of the ADEA beyond those forbidding age discrimination in hiring, firing, and wages, the Seventh Circuit remanded the case to the District Court with the instruction that Petitioners' ADEA claims be dismissed. [App. A, 29a.]

D. Statement Of Facts

At this initial pleading stage, the District Court required Petitioners to demonstrate that they had factual support for their subterfuge allegations, and Petitioners did so to the court's satisfaction. [Drnek R. 41, 4-5.] During the hearing for that purpose, citing published reports quoting City officials, Petitioners noted that the MRO was enacted "as a way to create hiring and promotional opportunities in the fire department and police department for the benefit of younger employees," "for the benefit of creating some job openings for minorities in those departments," and for the purpose of getting rid of the so-called "deadbeats" and "old-timers" in the departments. For example, the Mayor, who introduced the Ordinance to the City Council, was quoted in news reports as saying he pushed the retirement age because

"it was the right thing to do. We need to bring new life and more diverse leadership into the Police and Fire departments." He announced the introduction of the MRO by saying that it "would open up managerial positions for the younger rank and file." The Chairman of the City Council's Police and Fire Committee, who sponsored the Ordinance, was quoted as saying, "At 63, it is time to go in the Fire Department. This gives the younger guys an opportunity to get promoted. This is very important; it motivates them to do better." Later, he said, "[The MRO] gives young guys the opportunity to get promoted and would allow removal of 'deadbeats' in the senior ranks in the troubled Fire Department." [Drnek R. 41, 11-13, 15.]

Since the implementation of mandatory retirement at the end of the year 2000, hundreds of Chicago's firefighters and police officers, age 63 and older, have been involuntarily forced to retire.

REASONS FOR GRANTING THE PETITION

I. Introduction

This case raises an important question of federal law with profound national significance: Whether it is permissible for a municipality to use a discrete ADEA exemption, intended by its own terms to be used for public safety reasons, to implement a mandatory retirement program for older firefighters and police officers (which it casts as "deadbeats" and "old-timers") in order to achieve greater racial, gender, and age diversity within its police and fire departments? On a motion to dismiss, the Seventh Circuit answered this affirmatively and foreclosed Petitioners' legal challenge to

the mandatory retirement program that cost hundreds of experienced Chicago police officers and firefighters their jobs, and likewise will adversely affect hundreds of others in the future.

By deciding that a municipality may use age restrictions for the discharge of its firefighters or police officers for virtually *any* reason — even for affirmative action reasons wholly unrelated to public safety, and where discharge is motivated by the very age-stereotyping the ADEA was expressly designed to prevent — the Seventh Circuit's decision has forged a rule of law that will invite municipalities throughout the country to abuse the limited flexibility that the public safety exemption was meant to afford them. This represents such a grave judicial narrowing of the anti-discrimination protections which Congress meant to preserve for firefighters and police officers in the ADEA that this case departs from the usual course of judicial proceedings, creating a compelling need for this Court to exercise its supervisory powers.

There are several additional reasons why this Court should grant a Writ of Certiorari in this case. Critically, the Seventh Circuit's decision is in direct conflict with the Second Circuit's ruling in *Equal Employment Opportunity Commission v. Home Ins. Co.* ("*Home Insurance*,"), 672 F.2d 252 (2d Cir. 1982) on who bears the burden on the "subterfuge" issue, and what must be shown. Furthermore, the fact that the District Court certified a question for interlocutory review shows that there is confusion about the scope and meaning of the public safety exemption to the ADEA, and clear guidance from this Court which would help resolve that confusion is wanting. Indeed, the public safety

exemption to the ADEA has never been directly addressed by this Court. While the Seventh Circuit attempted to resolve the question certified for interlocutory appeal, it found "ambiguity" in the ADEA, and then dismissed that "ambiguous" language as "meaningless." [App. A, 8a n.4.] Finally, the Seventh Circuit's approach to interpreting the public safety exemption, while ostensibly relying on *Betts*, is in fact in conflict with this Court's specific, self-limiting holding in that case. 492 U.S. 158. For all of these compelling reasons, Petitioners respectfully request that this Court grant their petition.

II. The Seventh Circuit's Decision Creates A Split Among The Circuit Courts On How Subterfuge Is Determined And On Whose Burden The Issue Rests

The Seventh Circuit's decision is directly in conflict with the Second Circuit's decision in *Home Insurance* which analyzed whether a plaintiff could make a viable claim of subterfuge under an older version of the ADEA's benefit plan exemption, set forth at 29 U.S.C. § 623(f)(2) (1978), in challenging a mandatory retirement plan as discriminatory. 672 F.2d at 252. Like the public safety exemption discussed in this appeal, the 1978 version of the benefit plan exemption contained a subterfuge exception. As codified, the benefit plan exemption stated that it was not unlawful for an employer "to observe the terms of . . . any bona fide employee benefit plan . . . which is not a subterfuge to evade the purposes of this chapter." 29 U.S.C. § 623(f)(2) (1978).

Although the Seventh Circuit and the Second Circuit both faced similar subterfuge-based allegations of discrimination with respect to the termination of older workers, the two Circuits came to two conflicting conclusions with respect to

plaintiffs' subterfuge claims. The two Circuits disagreed about: (1) who bears the burden of proof on the issue of subterfuge; and (2) whether a subterfuge prohibition in an ADEA exemption necessarily requires an intent analysis.

On the issue of who bears the burden of proof, the Seventh Circuit concluded that it is the plaintiff's burden to prove subterfuge in order to show that an employer does not qualify for safe harbor under the 623(j) exemption. [App. A, 25a ("[T]he burden is on the plaintiffs to establish that the mandatory retirement of firefighters and police officers constitutes a subterfuge to evade the purposes of the ADEA").] The Second Circuit in *Home Insurance*, however, held that it is the *employer* that bears the burden of proving that it satisfies each of the requirements of an ADEA exemption in order to qualify for safe harbor, including the requirement that its actions are not a subterfuge to evade the ADEA's purposes. 672 F.2d at 257.[1]

On the issues of the scope of ADEA exemptions and the relevance of an employer's subjective intent in determining exemption applicability, the approaches taken by the two Circuits are diametrically opposed. The Seventh Circuit has held that hiring and firing of public safety workers is *ipso facto* not a subterfuge, because the mere existence of the public safety exemption trumps any prohibitions in the ADEA against discrimination in hiring and firing, essentially

---

1. Although the *Home Insurance* decision was issued prior to this Court's decision in *Betts*, the *Betts* Court cited favorably to that decision, 492 U.S. at 169, and did not criticize or otherwise suggest that any part of its holding was flawed. Therefore, implicit in *Betts* is the Court's tacit acceptance of *Home Insurance* and an acknowledgment that fringe benefits under the ADEA are materially different and should be treated differently than termination situations.

making the employer's motives with respect to hiring and firing decisions for public safety employees irrelevant.[2] [App. A, 29a-30a.]

In contrast, the Second Circuit in *Home Insurance* rejected the argument that a mandatory retirement plan was *ipso facto* not a subterfuge, concluding that "there is no basis for ruling that Home's action was not subterfuge without making an examination of Home's *motives* for lowering the mandatory retirement age. . . ." 672 F.2d at 258 (emphasis supplied). The Second Circuit concluded, based on a plain reading of the subterfuge provision contained within the benefit plan exemption, that "[p]roof by the employer of non-age-based reasons will . . . be required." *Id.* at 259. Indeed, the *Home Insurance* court accepted as evidence of subterfuge the exact type of motivational evidence the Seventh Circuit held to be irrelevant to a determination of subterfuge. *Id.* at 262.

Significantly, the District Court in this case relied heavily upon the Second Circuit's decision in *Home Insurance*, citing it several times to hold that Plaintiffs' subterfuge allegations were sufficient under section 623(j) of the ADEA. [App. C, 62a-64a ("Here the question of whether the [MRO] is indeed a subterfuge is one, ultimately, for the trier of fact . . . and it is not for me to determine whether an inquiry into the City Council's motives would be an unsatisfactory venture or a

---

2. The Seventh Circuit has placed hiring and discharge actions motivated by age bias and not public safety considerations beyond recourse, except in those remote circumstances where the hiring and firing decisions are motivated by *other* prohibited conduct under the ADEA — specifically, when motivated by the ADEA's discrete substantive provisions prohibiting retaliation or discrimination in fringe benefits.

revealing expedition;" "[S]ubterfuge under the ADEA is a question of fact . . . and the City's 'true motive' matters.") The Seventh Circuit rejected the District Court's analysis, and in turn, forged an interpretation of subterfuge that directly conflicts with the Second Circuit's *Home Insurance* decision. Petitioners believe this split in the Circuits necessitates review by this Court.

III. The Case Presents Important Questions Of Federal Law That Need To Be Resolved By This Court

This case raises important questions about the scope of a "safe harbor" exemption in the ADEA (and by extension, to exemptions in other remedial statutes) and the meaning that should be given to an exception, set forth within the body of the exemption itself, on employer action that is taken "as a subterfuge to evade the purposes of [the ADEA]." 29 U.S.C. § 623(j).

A. Fostering Diversity In The Ranks Of Fire And Police Departments Is Not A Lawful Purpose For The Mandatory Retirement Of Older Firefighters And Police Officers

Petitioners assert that the City engaged in subterfuge when it instituted mandatory retirement, not for legitimate public safety purposes tied to an authentic concern about their fitness to perform their jobs, but as a way to create large scale job openings and promotional opportunities for younger women and minorities in their departments, accomplishing this objective on the backs of older workers. [Minch R. 1, 9; Drnek R. 6, 5; R. 41, 4-12.]

It is well-recognized that the loss of a job — even when it is not for discriminatory purposes — imposes an enormous burden on the individuals involved. "The shock of compulsory retirement may be so overwhelming as to generate a lasting state of anxiety and even depression."[3] This burden is only enhanced when the involuntary termination is driven by inappropriate discrimination. The burden borne by Petitioners (and by others who will follow them) — hand-picked for layoff on the basis of their age in order to create large scale job openings for affirmative action purposes — is a burden that has never been countenanced in cases challenging race-based layoffs for affirmative action purposes. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 283 (1986) (Finding that "[w]hile hiring goals impose a diffuse burden, . . . layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive."). Nor should this burden be countenanced when a public employer, under the cover of an exemption intended by its own terms to be used for public safety purposes, discharges older firefighters and police officers so that it can achieve greater diversity in its ranks.

B. The Seventh Circuit's Decision Disregards The Intent Requirement That Congress Made Explicit In The Section 623(j) Exemption

At the heart of this case is the question of what anti-discrimination protections Congress intended to remain for older public safety employees when it included a specific subterfuge prohibition in the public safety exemption.

---

3. McDougal, Lasswell, and Chen. *The Human Rights of the Aged: An Application of the General Norm of Nondiscrimination.* 28 U. Fla. L. Rev. 639, 641 (1976).

In *United Air Lines, Inc. v. McMann*, this Court held that the term "subterfuge" must be given its plain meaning of "a scheme, plan, stratagem, or artifice of evasion," that indicates a specific, subjective "intent to evade a statutory requirement." 434 U.S. 192, 203 (1977). This definition requires the analysis of the employer's intent.

Despite this, the Seventh Circuit's decision reads the public safety exemption to the ADEA so broadly, and the subterfuge exception to the exemption so narrowly, that it essentially removes the subterfuge prohibition from the statute, determining that the "intent" of municipalities invoking the public safety exemption will rarely be relevant. If Congress had intended that the subterfuge prohibition would only mean a proscription against an illicit scheme or plan to violate a narrow range of substantive provisions of the ADEA, as the Seventh Circuit found, it could have written those specific substantive provisions explicitly into the subterfuge clause, by prohibiting "subterfuge to evade the prohibitions of § 623(d) (the retaliation provision of the ADEA)," for example. Instead, Congress gave "subterfuge" the *broadest possible* application by prohibiting "subterfuge to evade the purposes of this chapter." 29 U.S.C. § 623(j)(2). Despite acknowledging this Court's intent-based definition of subterfuge [App. A, 18a], the Seventh Circuit held that as far as hiring and firing decisions for public safety officers are concerned, the *intent* of the municipal employer imposing age restrictions does not matter. The Seventh Circuit's decision effectively nullifies the subterfuge clause of the exemption — the one stop-gap measure which Congress put in place to protect firefighters and police officers from discrimination in hiring and firing — leaving it flapping in the wind with no purpose.

C. The Seventh Circuit's Decision Is In Conflict With The Plain Language Of The 623(j) Exemption And The Public Safety Purposes For Which It Was Intended

The meaning of the "subterfuge" prong set forth in the ADEA exemption at 29 U.S.C. § 623(j) is evident from the statute's plain language and design. The Seventh Circuit, however, leapfrogged over the plain language and design of the statute, ignoring this Court's admonition that statutory analysis should start and (if possible, as it was here) end there.[4]

The key to interpreting the subterfuge exception to the public safety exemption is determining what Congress intended when it made reference to the "purposes of this chapter" in the subterfuge clause. 29 U.S.C. § 623(j)(2). The defined "purposes" of the ADEA, applicable to all beneficiaries of the Act's prohibitions, are plainly set forth at 29 U.S.C. § 621(b): "It is therefore the *purpose of this chapter* to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and

---

4. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) ("The first step [in statutory construction] 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case' . . . The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent."); *Bethesda Hospital Ass'n. v. Bowen*, 485 U.S. 399, 403-05 (1988) (In ascertaining the plain meaning of a statute, a court must look to the particular statutory language at issue, as well as to the language and design of the statute as a whole.); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979) (The court's task is to "interpret the words of [the statute] in light of purposes Congress sought to serve.")

workers find ways of meeting problems arising from the impact of age on employment." (Emphasis supplied.) The public safety exemption, however, by its own language, has another "purpose" built in, a purpose explicitly detailed by Congress in the 1996 ADEA amendments: that the § 623(j) exemption be used for public safety purposes.

When it amended the ADEA's public safety exemption in 1996, Congress explicitly mandated that public employers would, in the future, be required to offer public safety employees a standardized fitness test before it could mandatorily retire them. *See* Pub. L. No. 104-208, § 1, 110 Stat. 3009-23 to 3009-25 (1996). Section 623(j)(1) specifically requires that an employer is entitled to safe harbor from the ADEA's prohibitions only if the "employer has complied with section 3(d)(2) of the [ADEA] Amendments of 1996. . . ."[5] Section 3(d)(2)[6], in turn, requires that, effective on the date of issuance of HHS regulations identifying valid, nondiscriminatory job performance tests, an employer seeking to enforce a mandatory retirement age must provide an opportunity to its public safety employees

5. In an apparent effort to explain typographical errors in the text of the codified statute, the Historical and Statutory Notes to the exemption explain that "[s]ection 3(d)(2) of the ADEA Amendments of 1996, referred to in subsec. (j)(1), probably means Pub. L. 104-208, Div. A., Title I, § 101(a) [Title I, § 119, subsec. 2(d)(2)], Sept. 30, 1996, 110 Stat. 3009-25, which is set out as a note under this section." 29 U.S.C. § 623(j), Historical and Statutory Notes, "Reference in Text." For the sake of consistency with the language set forth in § 623(j), petitioners make reference to section 3(d)(2) with the same caveat.

6. A full recitation of the comprehensive fitness testing scheme, which was included in the 1996 Amendments to the ADEA, is set forth at App. A, 6a-8a n.4.

to demonstrate their fitness to continue in their job, by passing a standardized fitness test. [App. A, 6a-8a n.4.]

In keeping with the broad purposes of the ADEA, Congress' explicit reference to the 3(d)(2) provision was designed to ensure that the abilities of older public safety workers would be respected and their rights protected when municipalities sought to impose age restrictions in hiring and firing through the use of the exemption. With these provisions in mind, and when the statute is read as a whole, there is no merit to the Seventh Circuit's conclusion that Congress intended the public safety exemption to be an open invitation to municipal employers to implement arbitrary, discriminatory age restrictions in their hiring and firing decisions affecting public safety employees.[7] By incorporating 3(d)(2) into § 623(j)(1) of the exemption, Congress steeped the exemption in a *public safety* purpose, and manifested its intent that the *only* justification for giving employers safe harbor under 623(j) is when a discharge is motivated by considerations of an employee's fitness to perform his or her job, not by other reasons — particularly not reasons that are motivated by discriminatory intent or which attempt to achieve purely political goals (like affirmative action) on the backs of older workers.

The Seventh Circuit gives the explicit reference to 3(d)(2)'s fitness provisions short shrift, finding that the reference to them in the first prong of the exemption creates "ambiguity" in the statute. [App. A, 6a-8a n.4.] The court declares § 623(j)(1)'s incorporated reference to 3(d)(2) "meaningless," since the

---

7. Indeed, the very fact that Congress created the exemption specifically to apply to public safety personnel — and not to all government employees — suggests that its underlying purpose was public safety.

standardized tests that Congress intended to be in place have never been developed. [App. A, 6a-8a n.4.] While the requirement that employers comply with section 3(d)(2) may still be a prospective one, however, this does not negate the clear *purpose* of the exemption. In mandating the development of fitness tests for public safety employees, Congress rejected the notion that public employers should be permitted to use age as a proxy for fitness to perform public safety jobs and declared its intent that public safety employees should be able to *continue to work* "based on their ability rather than age." 29 U.S.C. § 621(b).[8] Petitioners request that this Court grant a Writ of Certiorari to clarify the Seventh Circuit's perceived "ambiguity" in the statute and to correctly interpret the meaning of the Act's "purposes" which are referred to in the ADEA's subterfuge prong.

IV. The Seventh Circuit's Decision Conflicts With This Court's Decision In *Public Employees Retirement System Of Ohio v. Betts* And Represents A Profound Departure From The Usual Course Of Judicial Proceedings, Creating A Compelling Need For This Court To Exercise Its Supervisory Powers

The Seventh Circuit's decision conflicts with this Court's holding in *Betts*, particularly the admonition that *Betts* was not intended to reach hiring and firing decisions. The *Betts* Court, analyzing a benefit plan exemption in the ADEA which also contained a subterfuge exception, surgically carved

8. The presence of this testing requirement mitigated the concerns of some members of Congress, worried that permitting age-based mandatory retirement of public safety employees was overly restrictive and inflexible. *See* 141 Cong. Rec. H3822-01 (March 28, 1995) (comments of Rep. Fawell); 142 Cong. Rec. S11922-01 (September 30, 1996) (comments of Sen. Moseley-Braun).

benefit plans out from the ADEA's broad protections against arbitrary age-based employment decisions, but left intact the ADEA's protections against the use of conduct that would discriminate in hiring, firing and other non-fringe-benefit aspects of the employment relationship. *Betts*, 492 U.S. at 177, 181. It is beyond dispute that forced retirement is a non-fringe-benefit aspect of the employment relationship. By its own terms, *Betts* is inapposite, and the Seventh Circuit's use of *Betts* is in direct conflict with *Betts* itself.

The Seventh Circuit's determination that the subterfuge prohibition only relates to substantive ADEA prohibitions other than those making discriminatory hiring and firing unlawful, effectively renders the subterfuge exception a nullity when hiring and firing are at issue. The Seventh Circuit's mechanical adoption of the *Betts* outcome is unwarranted, as it uses the *Betts* analysis in a manner in which the *Betts* Court would not approve. Indeed, if *Betts* is properly understood, the Seventh Circuit's opinion here is in conflict with the first tenet of statutory construction set forth in *Betts* — the requirement that the Court first look to the plain language and design of a statute to interpret its meaning. The fact that the *Betts* Court advanced beyond that first step in the statutory interpretation process in an attempt to harmonize what it found to be conflicting provisions in the ADEA exemption (on the one hand, the exemption permitting some forms of discrimination in employee benefit plans, and on the other hand, the subterfuge prong that prohibits any evasion of the "purposes" of the ADEA) does not mean that in *every* case there will be such a conflict. Indeed, here no such conflict exists, yet the Seventh Circuit reads *Betts* to suggest otherwise, concluding that there is virtually always a conflict between an exemption to a remedial statute and its anti-discrimination purposes. Unlike the benefit plan

exemption addressed in *Betts*, there *is* a way to give both the exemption and the subterfuge exception to the exemption meaning. An untainted public safety purpose in implementing a mandatory retirement plan for public safety employees would legitimately allow a municipality to utilize the exemption.

The Seventh Circuit, however, has held that *any* attempt by a municipality to take advantage of the public safety exemption, no matter how tainted its motivation, cannot violate the ADEA unless it is a mechanism to cover discrimination which violates a separate (non hiring or firing) substantive prohibition. [App. A, 18a-20a.] But unlike the remaining substantive prohibitions which remained standing as protections against discrimination under the *Betts* analysis (the ADEA's prohibitions against discrimination in hiring, firing and wages), the protections against discrimination which remain under the Seventh Circuit's analysis (the prohibitions against retaliation and discrimination in fringe benefits) are so narrow and unlikely as to be practically meaningless, and are easily concealed by the sweeping terminations a mandatory retirement scheme creates. Illogically, under the Seventh Circuit's analysis, the scope of the public safety exemption now has greater breadth, and therefore provides more complete safe harbor to employers, than an exemption in the ADEA which permits mandatory retirement of "bona fide executive or high policymaking" employees that has *no* subterfuge language in it.[9] Indeed, the

9. *Compare* 29 U.S.C. § 631(c) *and* 29 U.S.C. § 623(j). Indeed, three different Circuits have held that under the "bona fide executive or high policymaking" exemption, it is the employer who has the burden to demonstrate the applicability of that exemption, in stark contrast to the decision of the Seventh Circuit here, which places the

(Cont'd)

Seventh Circuit's take on the § 623(j) exemption places it squarely in conflict with scores of decisions asserting that remedial statutes should be construed broadly and exemptions should be construed narrowly. The ADEA is a remedial statute. *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995). As such, it must be liberally construed. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 765-66 (1979) (Blackmun, J., concurring) (ADEA must be construed liberally because of its broad remedial purposes). Conversely, exemptions to a remedial statute are to be interpreted narrowly. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). Indeed, in most cases, the burden is on the party seeking to take advantage of an exemption from a remedial statute. *Id.* at 395 n.14.

In forcing the *Betts* analysis onto hiring and firing cases, the Seventh Circuit's decision is also in conflict with the decisions of other Circuits concerning interpretations of remedial statutes and exemptions. *See Bridewell v. Cincinnati Reds*, 155 F.3d 828, 831 (6th Cir. 1998); *Johnson v. City of Columbia, S.C.*, 949 F.2d 127, 130 (4th Cir. 1991). It is additionally in conflict with other Circuits' decisions concerning "safe harbors," requiring a defendant to meet all of the safe harbor's stated requirements in order to qualify for its protections. *See, e.g., Stuart v. UNUM Life Insurance Co. of America*, 217 F.3d 1145 (9th Cir. 2000). The language of the § 623(j) "safe harbor" contains *two* requirements that the City must satisfy to receive the safe harbor's benefit:

(Cont'd)
burden on employees to challenge the use of the public safety exemption. *See Morrissey v. Boston Five Cents Savings Bank*, 54 F.3d 27, 32 (1st Cir. 1995); *Passer v. American Chemical Society*, 935 F.2d 322, 328 (D.C. Cir. 1991); *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 726-27 (2d Cir. 1984).

(1) a requirement concerning the minimum retirement age (29 U.S.C. § 623(j)(1)); *and* (2) a requirement that mandatory retirement be part of a bona fide plan that is not a "subterfuge to evade the purposes" of the ADEA (29 U.S.C. § 623(j)(2)). Congress intended that *both* elements be fulfilled for a municipality to qualify for the exemption from the ADEA. The Seventh Circuit's decision trivializes the subterfuge requirement; yet this cannot be what Congress intended by expressly prohibiting municipalities from engaging in subterfuge by creating mandatory retirement schemes. Its decision is so far from the standard in employment law jurisprudence,[10] which calls for the expansive construction of exemptions contained within remedial statutes and the narrow construction of exceptions to those exemptions, that it requires this Court's assertion of its supervisory powers of review.

---

10. When the *Betts* Court placed the burden of proving subterfuge on the plaintiff, Justice Marshall in his dissent noted that placing the burden of proving a covert, discriminatory use of benefit plans upon the benefit plan claimants was a burden that would be nearly impossible to meet. 492 U.S. at 187 (Marshall, J., dissenting). Following the *Betts* decision, Congress acted swiftly, in enacting the Older Workers Benefit Protection Act, to shift that burden. P.L. 101-433 § 101, 104 Stat. 978 (1990). It makes no sense to place that same onerous burden on claimants in hiring and firing cases, especially when by its own terms the *Betts* decision specifically excludes such cases from the purview of its limitations on subterfuge.

CONCLUSION

The Seventh Circuit's ruling that the public safety exemption affords government employers safe harbor from any scrutiny of their motivations for hiring and firing decisions affecting firefighters and police officers will invite municipalities around the country to abuse the use of the public safety exemption. The exemption does not give municipalities free rein to create any sort of mandatory retirement system they desire for police officers and firefighters. The plain language of the ADEA itself reveals that Congress intended the exemption to provide states and municipalities *limited* flexibility to use mandatory retirement *for public safety purposes*, not for *any* purpose.

The Seventh Circuit has erroneously decided important questions of federal law that should be addressed by this Court, and its decision is in conflict with this Court's decisions and those of other Circuits. Its decision fosters confusion about the meaning of the public safety exemption and its subterfuge provision. Accordingly, Petitioners respectfully request that the Court grant their petition for Writ of Certiorari and hear this case.

Respectfully submitted,

CLINTON A. KRISLOV
Counsel of Record
MICHAEL R. KARNUTH
KRISLOV & ASSOCIATES, LTD.
Civic Opera Building,
Suite 1350
20 North Wacker Drive
Chicago, Illinois 60606
(312) 606-0500

RONALD L. FUTTERMAN
JOAN MATLACK
WILLIAM THOMAS
FUTTERMAN & HOWARD,
CHARTERED
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603
(312) 427-3600

Attorneys for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED APRIL 9, 2004

In the
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 02-2587

JAMES D. MINCH, RICHARD A. GRAF,
and RICHARD COSENTINO,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO,

Defendant-Appellant.

No. 02-2588

DONALD DRNEK,

Plaintiff-Appellee,

v.

CITY OF CHICAGO,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
Nos. 01 C 0840 & 01 C 2586—**Elaine E. Bucklo**, *Judge*.

ARGUED FEBRUARY 28, 2003—DECIDED APRIL 9, 2004

Appendix A

Before POSNER, MANION, and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. In 1996, Congress restored to the Age Discrimination in Employment Act ("ADEA") an exemption permitting state and local governments to place age restrictions on the employment of police officers and firefighters. *See* 29 U.S.C. § 623(j) (1994 & Supp V 1999). Four years later, the Chicago City Council exercised its authority under this exemption to reestablish a mandatory retirement age of 63 for certain of the City's police and firefighting personnel. Police officers and firefighters who were subject to the age restriction filed two suits asserting in relevant part that the reinstated mandatory retirement program amounted to subterfuge to evade the purposes of the ADEA. *See* § 623(j)(2). Although the text of the City's ordinance indicated that the City was reestablishing a mandatory retirement age in furtherance of public safety, the plaintiffs asserted that in truth the City, as evidenced by the remarks of certain City Council members and City officials, acted out of bias against older workers and a desire to open positions on its police and firefighting forces for younger and more diverse individuals. The City moved to dismiss the complaints, contending that the plaintiffs had failed to state a claim of age discrimination on which the court could grant relief. The district court denied the motion, reasoning that if the plaintiffs could prove that the City reinstated a mandatory retirement age for discriminatory reasons, the mandatory retirement program would amount to a subterfuge to evade the purposes of the ADEA. *Drnek v. City of Chicago*, 192 F. Supp. 2d 835 (N.D. Ill. 2002) ("*Drnek I*"). The court subsequently certified for interlocutory appeal the question of whether there is any evidence through which a plaintiff

might prove that a mandatory retirement program, so long as it satisfies the other criteria specified by the statutory exemption, *see* § 623(j)(1), constitutes a subterfuge to evade the purposes of the ADEA. *Drnek v. City of Chicago*, 205 F. Supp. 2d 894, 900 (N.D. Ill. 2002) ("*Drnek II*"). Although we answer that question in the affirmative, we conclude that the particular theory of subterfuge that the plaintiffs pursue in this case is not viable. We accordingly remand with directions to dismiss their ADEA claims.

I.

Historically, Chicago, like many other state and local governments, has placed age limits on the employment of its police and firefighting personnel. As early as 1939, for example, Chicago's municipal code required city firefighters to retire at the age of 63.

As it was originally enacted in 1967, the ADEA by its terms did not apply to the employees of state and local governments. Congress amended the statute to include those employees in 1974. P.L. 93-259 § 28(a)(2), 88 Stat. 55, 74 (April 8, 1974). However, in view of the Tenth Amendment jurisprudence of the day, *see National League of Cities v. Usery*, 426 U.S. 833, 96 S. Ct. 2465 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S. Ct. 1005 (1985), the constitutional validity of the amendment remained in doubt until 1983, when the Supreme Court held in *E.E.O.C. v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054 (1983), that the Tenth Amendment posed no obstacle to banning age discrimination by state and local

governments.[1] State and local rules establishing maximum hiring and retirement ages for police officers and firefighters were now vulnerable to challenge; only if it could be shown that age was a bona fide occupational qualification for these positions would the rules survive scrutiny under the ADEA. *See Kopec v. City of Elmhurst*, 193 F.3d 894, 897 (7th Cir. 1999). The Equal Employment Opportunity Commission ("E.E.O.C.") began to challenge these age limits as discriminatory. Chicago, seeing the handwriting on the wall, raised the mandatory retirement age for its firefighters and police officers to 70, the maximum age at which employees enjoyed the protection of the ADEA at that time.[2]

Responding to the concerns expressed by state and local governments, Congress in 1986 amended the ADEA to exempt the mandatory retirement of state and local police and firefighting personnel from the statute's coverage. P.L. 99-592 §§ 3, 4, 100 Stat. 3342, 3342-43 (Oct. 31, 1986).

---

1. More recently, of course, the Supreme Court has held that Congress exceeded its authority under the enforcement clause of the Fourteenth Amendment when it purported to abrogate the States' Eleventh Amendment immunity from suit by private individuals under the ADEA. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000). That holding does not affect the plaintiffs' suits against the City, however, as the Eleventh Amendment does not apply to municipalities. *See Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 401 & n.19 (1979); *Nelson v. LaCrosse County Dist. Atty.*, 301 F.3d 820, 827 n.7 (7th Cir. 2002); *Richman v. Sheahan*, 270 F.3d 430, 439 (7th Cir. 2001).

2. Congress later amended the ADEA to remove age 70 as the maximum age at which the statute applied. *See* P.L. 99-592 § 2(c)(1), 100 Stat. 3342, 3342 (Oct. 31, 1986).

As we noted in *Kopec*, Congress enacted the exemption in recognition that there was, as of that time, no consensus as to the propriety of age limits on employees working in the realm of public safety. 193 F.3d at 903-04. The exemption thus permitted any state or local government which, as of March 3, 1983 (the day after the Supreme Court decided *E.E.O.C. v. Wyoming*), had in place age restrictions on the employment of police officers and firefighters, to restore those restrictions.[3] In 1988, Chicago took advantage of the

3. The exemption provided that "[i]t shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken:

> (1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and
>
> (2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

29 U.S.C. § 623(j) (1988).

The 1986 legislation also called upon the United States Secretary of Labor and the E.E.O.C. to study the feasibility of examining police and firefighting personnel for physical and mental fitness as an alternative to age limitations on their employment. P.L. 99-592 § 5, 100 Stat. 3342, 3343. The legislation further directed the E.E.O.C. to propose guidelines for the administration of such physical and mental assessments. *Id.* Although a feasibility study was completed, no guidelines for the administration of fitness testing for such workers were ever proposed. *See Kopec*, 193 F.3d at 897 n.1.

exemption and reinstated a mandatory retirement age of 63 for its firefighters and police officers.

Pursuant to a sunset provision in the 1986 legislation, the exemption permitting the reinstatement of these age limits expired at the end of 1993. P.L. 99-592 § 3(b), 100 Stat. 3342, 3342. In the ensuing years, Chicago, along with other state and local governments, were again compelled to drop their age restrictions on the employment of police and firefighting personnel.

In 1996, however, Congress reinstated the exemption, this time without any sunset provision, and retroactively to the date that the prior exemption had expired in 1993. P.L. 104-208 §§ 119(1)(b), 119(3)(b), 110 Stat. 3009, 3009-23 -3009-25 (Sept. 30, 1996); *see Kopec*, 193 F.3d at 898. The 1996 legislation also broadened the exemption, allowing cities and states which had not imposed age restrictions on their police and firefighters prior to the *Wyoming* decision to enact such limits. As relevant here, the exemption, codified at 29 U.S.C. § 623(j),[4] permits a public employer to discharge

---

4. The 1996 exemption provides as follows:

> (j) **Employment as firefighter or law enforcement officer.**
>
> It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(Cont'd)

Appendix A

(Cont'd)

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B) (i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

29 U.S.C. § 623(j) (1994 & Supp. V. 1999).

(Cont'd)

Appendix A

(Cont'd)

In the 1996 legislation, Congress also directed the Secretary of Health and Human Services to study and report to Congress within three years on the feasibility of testing the ability of police and firefighters to complete public safety tasks. Within four years, the Secretary was to issue advisory guidelines for the use and administration of tests designed to gauge the mental and physical competence of police and firefighting personnel. After those guidelines were issued, the Secretary was further directed to issue regulations identifying appropriate tests that a state or local government could use to evaluate the fitness of police officers and firefighters who had reached the mandatory retirement age specified by that government. Once those regulations were in place, state and local governments would be compelled to give their public safety personnel the opportunity to demonstrate their continued fitness for duty once they reached retirement age. P.L. 104-208 § 119(2), 110 Stat. at 3009-24 - 3009-25; *see Kopec*, 193 F.3d at 898 n.2. To date, however, no such guidelines or regulations have been issued.

The failure to promulgate guidelines and regulations for fitness testing gives rise to an ambiguity in the statute. Section 623(j)(1) purports to condition applicability of the exemption on the state or local government's compliance with section (3)(d)(2) of the 1996 amendment. This is an apparent reference to the fitness guidelines and regulations that the Secretary of Health and Human Services was directed to promulgate. *See Drnek I*, 192 F. Supp. 2d at 838-39. As no such guidelines and regulations have yet been issued, state and local governments obviously cannot comply with them. Consequently, this component of section 623(j)(1) is essentially meaningless at this juncture. As the district court summarized, "The provision in § 623(j)(1) for compliance with § 3(d)(2) merely imposed an obligation on employers to provide [fitness] tests when and if suitable tests became available; it did not make tests a condition precedent to the operation of the exception. Because HHS has not promulgated the regulations called for by the statute, the City could not violate § 623(j)(1) by failing to provide fitness tests before enforcing the [Mandatory Retirement] Ordinance." *Id.* at 842.

a police officer or firefighter based on his age, subject to two principal conditions. First, section 623(j)(1) specifies that the employee must have attained either the age of retirement that the state or municipality had in place as of March 3, 1983 or, if the age limit was enacted after the date the 1996 exemption took effect, the higher of the retirement age specified in the post-1996 enactment or the age of 55. Second, section 623(j)(2) requires that the state or city discharge such an employee pursuant to a bona fide retirement plan that is not a subterfuge to evade the purposes of the statute.

Four years later, the Chicago City Council adopted a mandatory retirement ordinance ("MRO") reinstating a mandatory retirement age of 63 for its police officers and for its uniformed firefighting fire personnel.[5] In the preamble

5. In relevant part, the City's Municipal Code, as amended by the MRO, reads:

> (a) Effective December 31, 2000, the age of 63 shall be the maximum age for employment of sworn members of the police department, including a sworn member who is transferred or appointed to a supervisory or administrative position.
>
> (b) Effective December 31, 2000, the age of 63 shall be the maximum age for employment of any member of the uniformed service of the fire department, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including

(Cont'd)

to that ordinance, the City Council indicated that its purpose in restoring the retirement age was to protect the safety of Chicago residents.[6]

(Cont'd)

> an employee engaged in this activity who is transferred or appointed to a supervisory or administrative position. . . .
>
> * * *
>
> (d) All persons to whom this ordinance applies shall be retired upon attainment of age 63. Any person to whom this ordinance applies whose age is 63 or more on December 31, 2000 shall be retired upon that date.
>
> * * *

Municipal Code of Chicago § 2-152-410 (Lexis Nexis 2001).

6. The preamble to the MRO stated:

> WHEREAS, The Safety of the citizens of the City of Chicago is of the utmost concern to the City Council of the City of Chicago; and WHEREAS, The citizens of the City of Chicago deserve the most effective police and fire protection possible;
>
> WHEREAS, The City Council finds that these goals are served by returning to the mandatory retirement age of sixty-three which had historically applied to sworn police and uniformed firefighters; and

(Cont'd)

Appendix A

The four plaintiffs were Chicago police officers and uniformed firefighters who were 63 or greater when the MRO took effect and thus were forced to take immediate retirement. They filed two actions against the City asserting, in relevant part, that the City was not actually motivated by public safety purposes in enacting the MRO. The cases were consolidated in the district court. Although the plaintiffs do not dispute at this juncture that the MRO and their involuntary retirement pursuant to the MRO satisfy the criteria set forth in section 623(j)(1), they allege that the MRO amounts to a subterfuge to evade the purposes of the ADEA and for that reason amounts to illegal age discrimination. Among other motives for enacting the MRO, the plaintiffs assert, the City wanted to get rid of what one city council member described as "old-timers" and "deadbeats" in the police and fire departments and to make room in those departments for younger, more racially and ethnically diverse individuals who would work harder and bring "fresh" ideas with them. This amounts to age discrimination in violation of the ADEA, in the plaintiffs' view.

(Cont'd)

> WHEREAS, Both the Illinois Legislature and United States Congress have recognized the necessity of allowing municipalities to institute mandatory retirement for police and fire personnel;
>
> . . . .

Journal of Proceedings in the Chicago City Council Journal, May 17, 2000, 32900-32901.

Appendix A

The district court denied the City's motion to dismiss the plaintiffs' ADEA claims. *Drnek I*, 192 F. Supp. 2d at 843-46. In the court's view, the question of whether the city reinstated a mandatory retirement age of 63 as a subterfuge for age discrimination was one of fact that necessitated inquiry beyond the statement of purpose set forth in the preamble to the MRO into the true motive or motives behind the legislation. *Id.* at 844-45. "Age-based retirement is tolerated in limited circumstances under § 623(j), but not for the wrong reasons, *i.e.* not for reasons that are merely a coverup for the type of ageism prohibited by the ADEA." *Id.* at 845. Here, the plaintiffs were able to point to the remarks of the sponsor of the MRO and of high-ranking city officials as proof that the City may have been motivated impermissibly by stereotypes and bias against older members of the police and fire departments when it enacted the MRO. The plaintiffs also represented that the City had delayed reinstating the retirement age of 63 until after a close friend of the Mayor (who otherwise would have been forced to retire) voluntarily retired at age 68. The district court found these allegations, suggesting that the City did not actually enact the MRO for legitimate, safety-related reasons, sufficient to state a viable claim for subterfuge. *Id.* at 843-46.

On reconsideration, the court distinguished *Bell v. Purdue Univ.*, 975 F.2d 422 (7th Cir. 1992), in which this court had rejected a claim of subterfuge notwithstanding evidence of an employer's animus toward older employees. *Bell* dealt with an employer's practice of ceasing pension fund contributions on behalf of an employee once he or she reached the age of 65. The relevant version of the ADEA

contained an exception permitting age-based decisions in employee benefit programs so long as they were not a subterfuge to evade the purposes of the statute. *See* 29 U.S.C. § 623(f)(2) (1982). Looking to the Supreme Court's decision in *Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158, 109 S. Ct. 2854 (1989), we concluded that an age-based differential in fringe benefits would not amount to a subterfuge unless the employer used that differential to camouflage age discrimination in some distinct aspect of the employment relationship—i.e., other than with respect to fringe benefits. *Bell*, 975 F.2d at 430. The City argued that here, as in *Bell*, there was no case to be made that it had taken advantage of a statutory exemption that expressly allowed mandatory retirement in order to commit some other type of age-based discrimination forbidden by the statute.

The district court acknowledged that "[t]here is some consistency between the City's interpretation here and the *Betts/Bell* interpretation." *Drnek II*, 205 F. Supp. 2d at 898. However, the court was concerned that applying the *Betts/Bell* approach in the context of mandatory retirement would render the subterfuge provision of section 623(j)(2) "if not dead, at least moribund." *Id.* Whereas the exception at issue in *Betts* and *Bell* concerned only fringe benefits, leaving all other aspects of the employment relationship protected by the ADEA's ban on arbitrary age discrimination, section 623(j) permits an employer to terminate a worker's employment altogether, leaving nothing in the employment relationship for the statute to protect. *Id.* Thus, a view of subterfuge that required the plaintiff to show that mandatory retirement is being used as a cover for some type of age discrimination other than age-based discharge would render

the "not a subterfuge" language of section 623(j)(2) "utterly meaningless." *Id.* at 899. The court therefore declined to apply *Bell* rationale to this case. It remained convinced that if the City had reinstated mandatory retirement with the aim of clearing older employees from the ranks of firefighters and police officers in order to make room for younger workers, as the plaintiffs alleged, that discriminatory purpose in and of itself would establish a subterfuge within the meaning of section 623(j)(2). *Id.*

Recognizing that there was room for disagreement on the issue, however, the court granted the City's request to certify a question for interlocutory review. *See* 28 U.S.C. § 1292(b). The City had asked the court to certify the question "whether allegedly illicit motives on the part of individual legislators and municipal officials for enacting a retirement plan that mandatorily retires police and fire personnel at age 63 and results in their replacement with younger workers can demonstrate subterfuge under section 623(j) of the ADEA." The court rejected this as an appropriate question, "because it is too early in the lawsuit to determine that this is the *only* type of evidence of subterfuge that the plaintiffs could discover." *Drnek II*, 205 F. Supp. 2d at 899 (emphasis in original). At the same time, the court was forced to wonder what proof might suffice to establish subterfuge. If, as the City contended, evidence of impure motives for enacting the MRO did not suffice, and if, as the court believed, it was essentially impossible for a plaintiff to establish the type of subterfuge envisioned by *Betts* and *Bell*, then as a practical matter, there was no way to show that a mandatory retirement program constituted a subterfuge to evade the purposes of the ADEA. In effect, so long as a mandatory retirement

program satisfied the basic eligibility criteria set forth in section 623(j)(1), the program would be immune from challenge as a subterfuge. *See id.* at 898-99. The court thus opted to certify a broader question than the City had proposed, asking "whether a plaintiff can demonstrate subterfuge under § 623(j)(2) with *any* kind of evidence if there is no violation of § 623(j)(1)." *Id.* at 900 (emphasis in original).

II.

This appeal calls upon us to consider under what circumstances a mandatory retirement program for public safety personnel might constitute a subterfuge to evade the purposes of the ADEA. The question certified by the district court asks whether there is any evidence with which a plaintiff can demonstrate subterfuge under section 623(j)(2) if there is no violation of section 623(j)(1). We agree with the district court that subterfuge can be shown even if the requirements of subsection (j)(1) are satisfied. A plaintiff can establish subterfuge if he or she can demonstrate that a state or local government took advantage of the exemption and imposed a mandatory retirement age for police and firefighting personnel in order to evade a different substantive provision of the statute. However, because the ADEA expressly permits employers like Chicago to reinstate mandatory retirement programs for police and fire personnel and thus to discharge employees based on their age, proof that local officials exercised this right for impure motives will not in and of itself suffice to establish subterfuge for purposes of section 623(j)(2). Given that the plaintiffs' theory of subterfuge in these cases relies solely on proof that Chicago City Council members and other City officials may have harbored

discriminatory attitudes about older workers when they reinstated a mandatory retirement age of 63 for police officers and firefighters and that they adopted the MRO for illicit motives unrelated to public safety, the plaintiffs have failed to state an ADEA claim on which relief may be granted.

The ADEA itself does not specify what constitutes a "subterfuge to evade the purposes" of the statute, and the Supreme Court has not specifically addressed that question within the confines of section 623(j)(2). However, the Supreme Court's decision in *Betts* and our own decision in *Bell* have considered the meaning of "subterfuge" for purposes of a similar provision of the ADEA, since revised. The language of section 623(j)(2) appears to have been modeled after (and is virtually identical to) the language construed in *Betts* and *Bell*, *see Knight v. Georgia*, 992 F.2d 1541, 1545 (11th Cir. 1993), and so we look to those cases for guidance as to what might constitute a subterfuge for purposes of section 623(j)(2). *See Trans World Airlines v. Thurston*, 469 U.S. 111, 121, 105 S. Ct. 613, 621 (1985); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756, 99 S. Ct. 2066, 2071 (1979).

At issue in *Betts* was the validity of an age-based disability retirement program for state and local government employees in Ohio. Under the terms of that program, an employee who became permanently disabled before the age of 60 was eligible for disability retirement benefits, which amounted to a minimum of 30 percent of her final average salary. Employees who became disabled after the age of 60, however, were eligible only for standard retirement benefits based on their age and years of service. No floor applied to

those benefits, so that an employee who became disabled after the age of 60 could (depending on her age and length of service) receive retirement benefits amounting to substantially less than 30 percent of her final average salary. The plaintiff in *Betts* had a medical condition that forced her to retire at age 61, and her monthly benefits under the standard retirement program were about half what they would have been had she been eligible for the age-restricted disability retirement benefits. She filed suit contending that the age ceiling of 60 that the program placed on disability retirement benefits violated the ADEA's ban on age discrimination.

At the time that *Betts* was decided, the ADEA contained a provision exempting from the statute's ban on age discrimination any bona fide employee benefit plan, including a retirement and pension plan, so long as the plan was not a subterfuge to evade the purposes of the statute. 29 U.S.C. § 623(f)(2) (1982). The parties in *Betts* conceded that the disability retirement plan at issue was bona fide, and as the Supreme Court noted, that plan fell squarely within the exemption. 492 U.S. at 166, 109 S. Ct. at 2860-61. Thus, only if the plan amounted to a subterfuge to evade the purposes of the statute would it be illegal. Interpretive regulations issued by the Department of Labor and the E.E.O.C. indicated that fringe benefit programs awarding different levels of benefits based on age were not a subterfuge so long as the age distinctions were cost-justified. Relying in part on those regulations, the lower courts had concluded that Ohio's disability retirement program amounted to a subterfuge to evade the purposes of the ADEA because the state could point to no cost justification or other substantial business purpose for restricting eligibility to persons who

became disabled before reaching the age of 60. *Betts v. Hamilton County Bd. of Mental Retardation*, 631 F. Supp. 1198 (S.D. Ohio 1986), *aff'd*, 848 F.2d 692 (6th Cir. 1988). The Supreme Court reversed.

At the outset of its analysis, the Supreme Court rejected the notion, reflected in the interpretative regulations, that an age-based distinction in employee benefits could only survive scrutiny under the ADEA if the employer were able to establish a cost justification for the distinction—i.e., that providing the benefit to older workers would burden the employer with added costs. In the court's view, such a requirement could not be squared with the plain language of the statutory exemption for fringe benefit plans, which said nothing about such a justification. 492 U.S. at 169-172, 109 S. Ct. at 2862-64. Although the plaintiff pointed to support in the legislative history for the notion that the exemption should be limited to age-based distinctions that were cost-justified, the Court saw no need to resort to legislative history, as the statutory language was clear: line-drawing based on age was permitted in a fringe benefit program so long as the program did not constitute a subterfuge to evade the purposes of the statute. *See id.* at 172, 109 S. Ct. at 2864.

The term, "subterfuge," in the Court's view, should be given its ordinary meaning, *id.* at 168, 109 S. Ct. at 2862, i.e., "a scheme, plan, stratagem, or artifice of evasion," *id.* at 167, 171, 109 S. Ct. at 2861, 2863 (quoting *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203, 98 S. Ct. 444, 450 (1977)). The Court observed that the purposes of the ADEA include promoting the employment of older persons based on ability rather than age, prohibiting arbitrary age

discrimination in employment, and helping employers and workers ascertain means of addressing difficulties arising from the impact of age upon employment. *Id.* at 175-76, 109 S. Ct. at 2866 (quoting 29 U.S.C. § 621(b)). The only one of these purposes that the retirement plan at issue could be a subterfuge to evade would be the elimination of arbitrary age discrimination in employment. *Id.* at 176, 109 S. Ct. at 2866. But not all age discrimination is arbitrary, the Court pointed out, for the ADEA itself sets out various exemptions from and affirmative defenses to its coverage. *Ibid.* In order to determine whether a particular practice is arbitrary, and therefore contrary to the purposes of the ADEA, one must look for guidance to the substantive provisions of the statute, which "provide the best evidence of the nature of the evils Congress sought to eradicate." *Ibid.* The statute does prohibit age-based discrimination in compensation and the other terms, conditions or privileges of employment, *see* 29 U.S.C. § 623(a)(1), and that provision could be construed to reach employee benefit plans. *Id.* at 176-77, 109 S. Ct. at 2866. One thus could say that any retirement or other employee benefit plan restricting eligibility based on age constitutes a form of age discrimination in the terms and conditions of employment and to that extent amounts to a subterfuge to evade the statutory purpose of prohibiting such arbitrary discrimination. *Id.* at 177, 109 S. Ct. at 2866. But that view obviously would render the statutory exemption for benefit programs "nugatory." *Ibid.* On the other hand, one could read the exemption and its "not a subterfuge" criterion to permit age-based line drawing in a fringe benefit program such as a disability retirement plan, so long as the plan does not discriminate "in other, non-fringe benefit aspects of the employment relationship." *Id.* at 177, 109 S. Ct. at 2866.

This alternate construction, the Court reasoned, would give effect both to the broad ban on arbitrary age discrimination in employment and to the exemption for bona fide employee benefit plans. *Id.* at 177, 180, 109 S. Ct. at 2866-67, 2868.

The Court postulated two scenarios in which an employee benefit plan might be considered an effort to evade the purposes of the ADEA. In the first scenario, an employer implements a provision in a benefit plan that has the effect of penalizing an employee who has spoken out against practices made unlawful by the ADEA. In that instance, the plan could be viewed as a means of retaliating against the employee for asserting his statutory rights, something which is forbidden by the anti-retaliation provision of the statute. *Id.* at 180, 109 S. Ct. at 2868; *see* 29 U.S.C. § 623(d). In the second scenario, the employer reduces the salaries of all workers while substantially increasing fringe benefits for younger workers. There too, the terms of the fringe benefit plan could be viewed as an effort to accomplish something that the statute expressly forbids—paying younger workers higher wages than older workers, based solely on age. *Ibid.*; *see* 29 U.S.C. § 623(a)(1). These examples sufficed to demonstrate that the subterfuge provision, construed as the Court thought it should be, provided "not-insignificant protections" to older workers while at the same time preserving a safe harbor for bona fide employee benefit plans. *Ibid.*

The Court therefore sustained Ohio's age-based disability retirement plan notwithstanding the lack of proof that the age cutoff of 60 was justified by cost considerations.

Appendix A

The statutory scheme placed the burden on the plaintiff to establish subterfuge, the Court observed:

> [The subterfuge prong of the exemption] is not so much a defense to a charge of age discrimination as it is a description of the type of employer conduct that is prohibited in the employee benefit plan context. By requiring a showing of actual intent to discriminate in those aspects of the employment relationship protected by the provisions of the ADEA, [the subterfuge prong] redefines the elements of a plaintiff's prima facie case instead of establishing a defense to what would otherwise be a violation of the Act. Thus, when an employee seeks to challenge a benefit plan as a subterfuge to evade the purposes of the Act, the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some non-fringe benefit aspect of the employment relation.

Id. at 181, 109 S. Ct. at 2868. The plaintiff in *Betts* had not shown that the retirement disability plan was a vehicle for discrimination in some aspect of employment relationship other than fringe benefits, and so she had not proven that it was a subterfuge to evade the purposes of the ADEA. *Id.* at 182, 109 S. Ct. at 2869.

In *Bell v. Purdue Univ.*, *supra*, this court considered whether a university's practice of discontinuing contributions to pension plans for employees once they reached age 65

might constitute a subterfuge.[7] Employees filed suit contending that the practice amounted to age discrimination. The university defended the practice based on the same statutory provision at issue in *Betts*, exempting a bona fide fringe benefit plan from the statutory ban on age discrimination so long as it was not a subterfuge to evade the purposes of the ADEA. This court found *Betts* controlling, and, accordingly, it looked for proof that the university's practice of cutting off pension fund contributions at age 65 reflected an effort to discriminate in other aspects of the employment relationship. 975 F.2d at 425-26, 428-29. We found no evidence to support such a finding.

Although the plaintiffs in *Bell* highlighted "statements and anecdotal evidence that some officials at Purdue preferred younger faculty," *id.* at 429, we found this evidence insufficient to support the claim of subterfuge. Arguably the evidence spoke to the university's motives for cutting off pension contributions for older employees—the plaintiffs held it up as proof that the cutoff was adopted as a way to discourage faculty members from staying on past the age of 65. But we made clear that "the defendants cannot be liable for their motives if their conduct has not evaded the ADEA's prohibitions." *Id.* And the plaintiffs could point to nothing suggesting that the university was using the contribution

---

7. An amendment to the ADEA which took effect after the plaintiffs filed suit required an employer to continue contributing to a pension fund on an employee's behalf until the employee actually retired. P.L. 99-509 § 9201, 100 Stat. 1973, 1973-74 (Oct. 21, 1986); *see Bell*, 975 F.2d at 423. *Bell* thus addressed the legality of the university's practice with respect to pension fund contributions prior to the effective date of the amendment. *Id.*

cutoff as a way to alter the wages of older employees, or alternatively to force their retirement or otherwise diminish their employment prospects. *Id.* at 429-30. "The plaintiffs . . . have offered no evidence that the fringe benefit cut in this case is anything more than meets the eye—an age differential in fringe benefits which is permitted under the ADEA." *Id.*

Here, the plaintiffs urge us to disregard the approach to subterfuge set out in *Betts* and followed by this court in *Bell.* The Older Workers Benefit Protection Act, P.L. 101-433 § 101, 104 Stat. 978 (Oct. 16, 1990) ("OWBPA"), overruled the result in *Betts*, amending the ADEA so as to prohibit employers from disfavoring older workers in employee benefit programs except as justified by cost considerations. *See Bell*, 975 F.2d at 424 n.2. For that reason, the plaintiffs insist that the *Betts* approach to subterfuge is no longer valid. We disagree.

Although Congress overruled the result of *Betts*, the manner in which it did so is telling. Rather than supplying its own definition of what constitutes a subterfuge to evade the purposes of the ADEA, Congress elected to remove the "not a subterfuge" language altogether from the exemption for benefit programs. *See* P.L. 101-433 § 103, 104 Stat. 978, 978-89. That course suggests that Congress, although displeased with the result in *Betts*, was not attempting to supplant the Court's approach to subterfuge. *See Modderno v. King*, 82 F.3d 1059, 1060-61 (D.C. Cir. 1996); *Knight*, 992 F.2d at 1546.

Betts itself made this same point. The Court in *Betts* looked to its prior decision in *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 98 S. Ct. 444 (1977), for guidance as to what might constitute a subterfuge. *McMann* had concluded that a retirement plan compelling employees to stop working at the age of 60 could not constitute a subterfuge to evade the purposes of the ADEA when the plan had been adopted more than 25 years before the statute was enacted. *Id.* at 203, 98 S. Ct. at 450. In the interim between *McMann* and *Betts*, Congress had overruled the result in *McMann* by adding language to the statutory exemption for benefit plans stating that no such plan shall require or permit the involuntary retirement of any individual based on his or her age. P.L. 95-256 § 2(a), 92 Stat. 189, 189 (April 6, 1978). In view of the amendment, the plaintiff in *Betts* contended that *McMann*'s subterfuge analysis was no longer good law. The Court rejected that argument. The Court noted that Congress had not amended the statute by supplying its own definition of subterfuge or by modifying the subterfuge language; rather, it had simply added a clause forbidding mandatory retirement based on age. 492 U.S. at 168, 109 S. Ct. at 2862. The Court thus saw no reason to depart from *McMann*'s understanding of subterfuge. *Ibid.*

In section 623(j)(2), Congress has used virtually the same language that the Court construed in *Betts*. Indeed, Congress enacted the current version of section 623(j) in 1996, years after *Betts* was decided. Had Congress intended for courts to embark on a different course with respect to subterfuge, it could have made that clear in the statutory language. Accordingly, we see no signal from Congress that subterfuge should be handled differently for purposes of section

623(j)(2) than it was by the Supreme Court in *Betts* and subsequently by this court, following *Betts'* lead, in *Bell*. *See Knight*, 992 F.2d at 1546. We note that our sister circuits, in construing similar subterfuge language contained in the Americans with Disabilities Act, 42 U.S.C. § 12201(c), have likewise continued to look to *Betts* as the relevant precedent on subterfuge. *See E.E.O.C. v. Aramark Corp.*, 208 F.3d 266, 269-70 (D.C. Cir. 2000); *Leonard F. v. Israel Discount Bank of New York*, 199 F.3d 99, 103-06 (2d Cir. 1999); *Ford v. Schering-Plough Corp.*, 145 F.3d 601, 611 (3d Cir. 1998); *Krauel v. Iowa Methodist Medical Center*, 95 F.3d 674, 678-79 (8th Cir. 1996).

Among other things, *Betts* makes clear that the burden is on the plaintiffs to establish that the mandatory retirement of firefighters and police officers constitutes a subterfuge to evade the purposes of the ADEA. 492 U.S. at 181, 109 S. Ct. at 2868. The plaintiffs remind us that the OWBPA also overruled *Betts* in this regard, shifting the burden to the employer to prove that a benefit plan drawing distinctions based on age is not a subterfuge. *See* P.L. 101-433 § 103, 104 Stat. 978, 979; *e.g.*, *Erie County Retirees Ass'n v. County of Erie, Pa.*, 220 F.3d 193, 204-05 (3d Cir. 2000). Once again, however, the route that Congress chose to that end is significant. Congress added language to the exemption for benefit plans expressly allocating to the employer the burden of proof on subterfuge. *See* § 623(f)(2) ("[a]n employer . . . shall have the burden of proving that [its] actions [in observing the terms of a benefit plan] are lawful in any civil enforcement proceeding brought under this chapter"). By contrast, it omitted such language in 1996 when it reenacted section 623(j)(2), electing instead to use language

virtually identical to that before the Supreme Court in *Betts*. The fact that Congress elected to use language that *Betts* had construed to impose the burden of proof on the plaintiff leaves no doubt in our minds that Congress meant to embrace that construction. *See Bragdon v. Abbott*, 524 U.S. 624, 645, 118 S. Ct. 2196, 2208 (1998); *Lorillard v. Pons*, 434 U.S. 575, 580-81, 98 S. Ct. 866, 870 (1978); *see also, e.g., Leonard F.*, 199 F.3d at 104. Therefore, we must proceed to consider how the plaintiffs might carry their burden within the *Betts* framework for subterfuge.

We may resolve one point with dispatch. In the question that the district court certified, the court asked whether there is any evidence with which a plaintiff might establish subterfuge for purposes of section 623(j)(2) if there is no violation of section 623(j)(1). If, for example, a public employer had in place age restrictions on the employment of public safety officers prior to March 3, 1983, as Chicago did, are there any circumstances under which the reinstatement or renewed enforcement of those age limits could possibly amount to a subterfuge to evade the purposes of the ADEA? The district court understood the City to be arguing that this question must be answered in the negative, foreclosing any inquiry into subterfuge. *Cf. Knight*, 992 F.2d at 1546-47 (because mandatory retirement age of 55 for Georgia state troopers was established in 1970, before ADEA was extended to cover state employees, the retirement age necessarily could not have been a subterfuge to evade the purposes of the ADEA); *see Drnek II*, 205 F. Supp. 2d at 897-98. To accept this argument as correct, the district court believed, would be to collapse the two prongs of section 623(j) and render subsection (j)(2), which contains the

subterfuge language, a nullity. *Id.* at 898-99. We agree. Section 623(j) permits a state or local government to discharge a police officer and/or firefighter who has reached a mandatory retirement age so long as that retirement age was in place when *Wyoming* was decided or (if not) the plaintiff is at least 55 years old (prong 1) *and* the discharge is effectuated pursuant to a bona fide retirement plan that is not a subterfuge to evade the purposes of the ADEA (prong 2). Both subsections of the exemption must be given meaning to the extent possible. *See, e.g., Ortloff v. United States*, 335 F.3d 652, 659 (7th Cir. 2003) (citing *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253, 112 S. Ct. 1146, 1149 (1992)), *cert. denied*, 124 S. Ct. 1520 (2004). As set forth below, we believe there are circumstances in which the reinstatement of mandatory retirement might amount to a subterfuge for purposes of section 623(j)(2), even if such a program meets the requirements of section (j)(1).

Evidence that City officials had impure motives for reinstating a mandatory retirement age, however, will not by itself support an inference of subterfuge. As *Betts* makes plain, an employment plan "cannot be a subterfuge to evade the ADEA's purpose of banning arbitrary age discrimination unless it discriminates in a manner forbidden by the substantive provisions of the Act." 492 U.S. at 176, 109 S. Ct. at 2866. The ADEA does not forbid Chicago from making age-based retirement decisions as to its police and firefighting personnel; it expressly allows state and local governments to make such decisions so long as they act within the parameters set forth in section 623(j)(1), which Chicago did. The statute does not condition the validity of such retirement programs on proof that the public employer

has adopted the program genuinely believing that it is justified in the interest of public safety. Instead, recognizing that there was not yet any national consensus as to the relationship between age and one's fitness to serve as a police officer or firefighter, Congress opted simply to restore the status quo *ante*, permitting states and cities to continue imposing age limits on these positions as they had been able to do prior to the ADEA's extension to state and municipal employers and *Wyoming*'s 1983 holding sustaining that extension. *See Kopec*, 193 F.3d at 903-04.

Thus, proof that Chicago resumed mandatory retirement for police and fire personnel based in whole or in part on stereotypical thinking—that older individuals are not up to the rigors of law enforcement or firefighting and should make room for younger, "fresher" replacements—or for reasons wholly unrelated to public safety, will not establish subterfuge because it does not reveal a kind of discriminatory conduct that the ADEA by its very terms forbids. The Supreme Court in *Betts* concluded that age-based decisions in disability retirement benefits were not vulnerable to challenge as a subterfuge merely because there was no proof that the age differentials were justified on a cost basis. The statute, as it was written at that time, expressly allowed such decisions. 492 U.S. at 169-177, 109 S. Ct. at 2862-67. Likewise, we concluded in *Bell* that an age-based cutoff in the university's retirement contributions did not amount to a subterfuge even in the face of evidence that the university preferred a younger faculty. "[T]he defendants cannot be liable for their *motives* if their *conduct* has not evaded the ADEA's prohibitions," we said, 975 F.2d at 429 (emphasis supplied), and doing something that the statute expressly permits does not evade its prohibitions. *See Betts*, 492 U.S. at 176-77, 109 S. Ct. at 2866-67.

Appendix A

What is necessary to establish subterfuge is proof that the employer is using the exemption as a way to evade another substantive provision of the act. *Id.* at 181, 109 S. Ct. at 2868. Both of the hypotheticals that *Betts* used to illustrate this point envision the employer making an age-based distinction that is expressly permitted by the statute as a means of committing another kind of discrimination that the ADEA prohibits. Here then, a viable claim of subterfuge would require the plaintiffs to allege and prove that Chicago took advantage of the statutory authorization to mandatorily retire police officers and firefighters as a means of discriminating in another aspect of the employment relationship—that is, other than in the discharge decision—in a way that the statute forbids.

The district court was concerned that so limiting the means of establishing subterfuge would render the subterfuge provision of section 623(j)(2) almost meaningless. Because mandatory retirement, in contrast to a reduction in fringe benefits, effectively ends the employment relationship, the district court reasoned, it would be difficult if not impossible for a mandatorily retired police officer or firefighter ever to show that the employer used the retirement program as a means of committing some independent form of forbidden discrimination. *Drnek II*, 205 F. Supp. 2d at 898-99.

Yet, that is not the case. In fact, each of the two hypotheticals that the Supreme Court cited in *Betts* as examples of viable claims for subterfuge under the former version of section 623(f)(2) readily translates into the present context. First, as *Betts* makes clear and as the district court recognized, a plaintiff of course would have a claim for

subterfuge if a city or state government exercised its right to reimpose age limits in order to retaliate against one or more employees for protesting practices made illegal by the ADEA. *Betts*, 492 U.S. at 180, 109 S. Ct. at 2868; *Drnek II*, 205 F. Supp. 2d at 899. Second, *Betts* suggested in the context of a fringe benefit plan that reducing the wages of all workers while substantially increasing the benefits provided to younger workers might constitute a subterfuge for wage discrimination against older workers. 492 U.S. at 180, 109 S. Ct. at 2868. One can imagine a variant of that hypothetical here: as the City suggests, if it were shown that a public employer had reinstated mandatory retirement for police and firefighting personnel pursuant to section 623(j) but, at the same time, created a new, lower-paying position not restricted by age and invited the mandatorily-retired officers to apply for that position, then it could be inferred that the employer was using its mandatory retirement program as a subterfuge for wage discrimination against older employees. These examples demonstrate that the subterfuge provision of section 623(j)(2) retains meaning when construed in a manner consistent with *Betts* and *Bell*. We therefore see no need to depart from the approach of those precedents.

We owe a plaintiff's complaint a generous construction in deciding whether it states a claim on which relief can be granted. *E.g.*, *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1001-02 (7th Cir. 2002). Here, the plaintiffs' complaints broadly allege that the MRO amounts to a subterfuge to evade the purposes of the ADEA. Unadorned, those allegations might state a viable ADEA claim if the plaintiffs were prepared to establish subterfuge in one of the ways illustrated by *Betts*. However, as fleshed out in the briefing, the

particular theory of subterfuge that the plaintiffs are pursuing is not viable. The plaintiffs suggest no way in which Chicago might have used its authority to reimpose mandatory retirement pursuant to section 623(j) as a subterfuge for forbidden discrimination in some other aspect of their employment relationship. Their sole contention is that in exercising the City's prerogative to reinstate mandatory retirement, certain City legislators and other officials were motivated by a desire to remove from the police and firefighting forces older workers whom they felt were not up to the job and/or to create openings for younger workers. Yet, the statutory exemption expressly permits the City to reinstate its mandatory retirement program, and the inevitable result of any such program will be to force older employees from the workforce and create openings for younger workers. That some City officials affirmatively wished for that result, perhaps because of unfortunate stereotypes about the abilities of older workers, is immaterial insofar as section 623(j)(2) is concerned. *Betts* and *Bell* require proof that the City was using mandatory retirement as a vehicle to commit some other type of age discrimination forbidden by the ADEA. And here the plaintiffs can postulate no type of discrimination other than the very type of age-based discrimination (mandatory retirement) that the statute permits.

Appendix A

III.

Having answered the question certified for interlocutory review, we REMAND these cases to the district court with directions to DISMISS the plaintiffs' ADEA claims and to conduct such further proceedings as may be consistent with this opinion. We thank the parties and amicus American Association of Retired Persons for their helpful briefs.

A true Copy:
Teste:

_____

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MAY 22, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 01 C 0840

DONALD DRNEK,

Plaintiff,

v.

CITY OF CHICAGO, an Illinois Municipal Corporation,

Defendant.

No. 01 C 2586

JAMES D. MINCH, RICHARD A. GRAF, and **RICHARD COSENTINO**, individually, and on behalf of a class of all individuals who are similarly situated,

Plaintiffs,

v.

CITY OF CHICAGO, an Illinois Municipal Corporation,

Defendant.

Appendix B

MEMORANDUM OPINION AND ORDER

On March 25, 2002, I granted in part and denied in part the City's motion to dismiss the plaintiffs' age discrimination and due process complaints. *See Drnek v. City of Chicago,* 192 F.Supp.2d 835 (N.D.Ill.2002). The City moves to amend that order to include a certification of the following question for interlocutory appeal under 28 U.S.C. § 1292(b):

> whether allegedly illicit motives on the part of individual legislators and municipal officials for enacting a retirement plan that mandatorily retires police and fire personnel at age 63 and results in their replacement with younger workers can demonstrate subterfuge under section 623(j) of the ADEA.

Mot. at 5. I also treat the motion as one to reconsider in light of the City's primary reliance on a case that it did not cite in its underlying briefs. *See* Minute Order of 4/10/02.

I. Motion to Reconsider

"Motions for reconsideration serve a limited function; to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the [underlying] motion. . . . Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time." *Rothwell Cotton Co. v. Rosenthal & Co.,* 827 F.2d 246, 251 (7th Cir.1987). Nonetheless, "reconsideration performs a

valuable function where the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension." *Bank of Waunakee v. Rochester Cheese Sales, Inc.*, 906 F.2d 1185, 1191 (7th Cir.1990).

The City challenges a very narrow part of my opinion: my consideration of the plaintiff's allegations of discriminatory animus in deciding that there were questions of fact precluding dismissal. At oral argument, the plaintiffs produced allegations that the City's true purpose for enacting the mandatory retirement ordinance was to clear out older employees to make room for promotional opportunities for younger employees. The City argued, then and now, that I could not look beyond the face of the ordinance to determine whether it was a subterfuge to evade the purposes of the ADEA. I rejected the City's reliance on *Pacific Gas Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), for the proposition that inquiry into the motives of the legislators' state of mind was never permissible. I held that *Pacific Gas* was distinguishable on two grounds: (1) that subterfuge is a factual question, whereas preemption, the issue in *Pacific Gas*, is a matter of law; and (2) that the legal standards in *Pacific Gas* and under the ADEA were different, and that the "true motive" of the legislators does matter for the purposes of § 623(j)(2) of the ADEA. *See* 192 F.Supp.2d at 844. The City argues that I erred in distinguishing *Pacific Gas* and points to *Bell v. Purdue University*, 975 F.2d 422 (7th Cir.1992), which it did not cite in any of its briefs on the underlying motion. The Seventh Circuit in *Bell*, when presented with anecdotal

evidence that the defendants preferred younger employees, stated that "the defendants cannot be liable for their motives if their conduct has not evaded the ADEA's prohibitions." *Id.* at 429.

Bell involved an application of the Supreme Court's decision in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989), to a challenge to a fringe benefit plan under § 623(f)(2) of the ADEA, rather than § 623(j), which is the provision at issue in this case. Section 623(a)(1) of the ADEA prohibits the failure or refusal to hire any individual, termination, or other discrimination "with respect to [the] compensation, terms, conditions, or privileges of employment, because of such individual's age." At the time *Betts* was decided, § 623(f)(2) provided an exemption from § 623(a)(1), and provided that it was not unlawful to observe the terms of a bona fide benefit plan that was not a subterfuge to evade the purposes of the ADEA, with the proviso that no plan could require or permit age-based involuntary retirement. *Betts*, 492 U.S. at 165-66. In *Betts*, the Court rejected an administrative interpretation of "not a subterfuge" that put the burden on the employer to demonstrate a cost-based justification for differential treatment of older employees, *id.* at 170-75, then set about the more difficult task of defining "subterfuge" for the purposes of § 623(f)(2).

Noting that the purposes of the ADEA could not be separated from its substantive provisions, the Court held that a plan enacted after the enactment of the ADEA "cannot be a subterfuge to evade the ADEA's purpose of banning arbitrary age discrimination unless it discriminates in a manner forbidden by the substantive provisions of the Act."

Id. at 176. Section 623(a)(1) is the primary enforcement mechanism of the ADEA, and the Court acknowledged that "[t]he phrase 'compensation, terms, conditions, or privileges of employment' in § [623](a)(1) can be read to encompass employee benefit plans of the type covered by § [623](f)(2)," but it rejected this interpretation because it "would in effect render the § [623](f)(2) exemption nugatory with respect to post-Act plans. Any benefit plan that by its terms mandated discrimination against older workers would also be facially irreconcilable with the prohibitions in § [623](a)(1) and, therefore, with the purposes of the Act itself." *Id.* at 177.

Thus, in order to give effect to both § 623(a)(1) and § 623(f)(2), the Court concluded that § 623(f)(2) "exempt[s] the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, non-fringe-benefit aspects of the employment relationship." *Id.* After considering the legislative history, the Court concluded that "this result permits employers wide latitude in structuring employee benefit plans, [but] it does not render the 'not a subterfuge' proviso a dead letter." *Id.* at 180. It gave two examples of possible actionable subterfuges: (1) "adopt[ing] a [fringe benefits] plan provision formulated to retaliate against . . . an employee" who had "participated in the filing of any age-discrimination complaints of litigation" in violation of § 623(d), which prohibits retaliation; and (2) "an employer's decision to reduce salaries for all employees while substantially increasing benefits for younger workers," *i.e.*, "utilizing [the] benefits plan as a subterfuge for age-based discrimination in wages, an activity forbidden by § [623](a)(1)." *Id.* The Court concluded by stating that the

defendant did not have a duty to prove the absence of subterfuge; instead, the existence of subterfuge was effectively an element of the plaintiff's *prima facie* case on which it bore the burden of proof. *Id.* at 181.

The Seventh Circuit in *Bell* recited these standards and applied them to an employee challenge to a pension benefit plan that discontinued pension contributions for employees above the age of 65 even if those employees continued to work. Noting the two examples of subterfuge from *Betts,* the court held that the plaintiffs had not produced any evidence that would bring them within the purview of the examples. 975 F.2d at 429. The court rejected "statements and anecdotal evidence that some officials at Purdue preferred younger faculty," stating that, even if a jury could infer that the cut in contributions to the pension plan was intended to weed out older employees, "the defendants cannot be liable for their motives if their conduct has not evaded the ADEA's prohibitions." *Id.* With respect to the second *Betts* example, the court noted that the hike in fringe benefits to younger employees did not violate the ADEA, it was the underlying wage-cut that it camouflaged that did violate the ADEA. *Id.* In that regard, the plaintiffs had "offered no evidence that the fringe benefit cut in this case is anything more than meets the eye—an age differential in fringe benefits which is permitted under the ADEA." *Id.* Because there was no extrinsic proof of a violation of another substantive provision outside the scope of the exception, the court declined to find subterfuge even in the face of evidence of discriminatory animus.

Appendix B

The City argues that the Seventh Circuit's language and reasoning in *Bell* precludes the plaintiffs in this case from relying on evidence of discriminatory motives of individual City officials to establish subterfuge. The City asks me to follow *Bell* and hold that, because there is no evidence of a violation of the age limits in § 623(j)(1), there can be no subterfuge. They argue that the mandatory retirement ordinance cannot be a subterfuge as a matter of law, regardless of evidence of intent to discriminate on the basis of age, because § 623(j) makes discriminatory age-based retirement for public safety officials legal. The City argues that an extension of *Betts* and *Bell* to § 623(j)(2) means that any intent to discriminate cannot make facially lawful actions unlawful if those actions fall within the exception in § 623(j)(1).

Cases construing § 623(j) have by and large adopted the *Betts* definition of "subterfuge" as a "scheme, plan, stratagem, or artifice of evasion." *See, e.g., Glennon v. Village of South Barrington,* No. 00 C 1264, 2000 WL 1230494, at *3 (N.D.Ill. Aug. 25, 2000). *See also Knight v. Georgia,* 992 F.2d 1541, 1545-46 (11th Cir.1993) (holding that, because previous § 623(f) and current § 623(j) both contain term "subterfuge," it was "appropriate to draw upon" case law interpreting § 623(f), and that the "body of law [construing § 623(f)] should properly be consulted to give meaning to the term 'subterfuge' as it appears in § [623](j)"). This case presents the question of the logical limits of the application of judicial interpretations of § 623(f) to § 623(j).

There is some consistency between the City's interpretation here and the *Betts/Bell* interpretation. For

example, the City argued in the reply to its original motion that construing "subterfuge" to mean that any discharge on the basis of age is a subterfuge to evade the purposes of the ADEA because it violates § 623(a)(1) would eviscerate the exception in § 623(j), which says that mandatory retirement on the basis of age is legal. The Supreme Court rejected a similar interpretation of subterfuge in the context of § 623(f). *Betts,* 492 U.S. at 177. However, the Supreme Court noted specifically that its interpretation did "not render the 'not a subterfuge' proviso a dead letter." *Id.* at 180.

However, the City's interpretation, which is essentially an extension of the *Betts/Bell* interpretation of § 623(f), would render the "not a subterfuge" provision of § 623(j), if not dead, at least moribund. An interpretation that requires a violation of the timing requirements in § 623(j)(1) in order to find that the challenged action is a subterfuge under § 623(j)(2) collapses the two inquiries. This circular reading of "not a subterfuge" in § 623(j)(2) would provide no protection that is not found elsewhere in the statute. By contrast, the exception in § 623(f) related only to fringe benefits, but left undisturbed all of the non-fringe aspects of the employment relationship that are protected by § 623(a), the "ADEA's primary enforcement mechanism." *Betts,* 492 U.S. at 176. Section 623(j), however, exempts employers entirely from the protections of § 623(a). That is, if an employee is mandatorily retired, there is nothing left of the employment relationship to protect. Thus the second example of a subterfuge in *Bell* could never apply to a claim under § 623(j). This interpretation of § 623(j) is circular and self-referential, and would render the "not a subterfuge" requirement empty language, because any mandatory

retirement ordinance that complied with the requirements of § 623(j) would, as a matter of law, not be a subterfuge. *See Welsh v. Boy Scouts of America,* 993 F.2d 1267, 1272 (7th Cir.1993) ("[A] court should not construe a statute in a way that makes words or phrases meaningless, redundant, or superfluous").

There is still the retaliation example from *Betts,* and a mandatory retirement ordinance that was enacted to retaliate against an employee who had complained of age discrimination could be a subterfuge under that example, but if that were the only manner in which a plaintiff could demonstrate subterfuge, then the remedies in § 623(d) and § 623(j) would be redundant. *See In re Merchants Grain, Inc.,* 93 F.3d 1347, 1354 (7th Cir.1996) (Courts should "construe statutes in the context of the entire statutory scheme and avoid rendering statutory provisions ambiguous, extraneous, or redundant."). The Supreme Court stated in *Betts* that its examples were "not exhaustive, but suffice to illustrate the not-insignificant protections provided to older employees by the subterfuge proviso in the § [623](f)(2) exemption." 492 U.S. at 180. Under a similar interpretation of § 623(j), however, the subterfuge provision provides no protection that is not already provided elsewhere in the ADEA, and would be rendered utterly meaningless.

It was for this reason that I held that evidence of subjective intent to discriminate on the basis of age was relevant to the question of subterfuge under § 623(j). Section 623(j) only applies if a mandatory retirement plan both meets the age requirements in § (j)(1) *and* is not a subterfuge under § (j)(2). The City's interpretation based on *Bell,* that facial

compliance with (j)(1) precludes me from looking elsewhere for evidence of subterfuge, would eviscerate the requirement that the plan not be a subterfuge. Therefore, I decline to apply the reasoning of *Bell* under § 623(f) to this case under § 623(j). *Bell* does not address *Pacific Gas,* or the reasons that I gave for distinguishing it and considering potential subjective proof of subterfuge, so it is not a basis for reconsideration of the narrow issue presented by the City in its motion. However, I will consider separately the propriety of certifying an interlocutory appeal under 28 U.S.C. § 1292(b).

II. Motion to Certify an Interlocutory Appeal

The denial of a motion to dismiss is not a "final decision" from which an immediate appeal is available under 28 U.S.C. § 1291. *Cherry v. University of Wisc. Sys. Bd. of Regents,* 265 F.3d 541, 546 (7th Cir.2001). However, § 1292(b) provides for interlocutory appeal of certain otherwise non-appealable orders. There are four statutory requirements: "there must be a question of *law,* it must be *controlling,* it must be *contestable,* and its resolution must promise to *speed up* the litigation." *Ahrenholz v. Board of Trustees of Univ. of Ill.,* 219 F.3d 674, 675 (7th Cir.2000) (emphases in original). All four criteria must be satisfied before I may certify an order for immediate appeal. *Id.*

The City asks me to certify the following question: whether allegedly illicit motives on the part of individual legislators and municipal officials for enacting a retirement plan that mandatorily retires police and fire personnel at age 63 and results in their replacement with younger workers

can demonstrate subterfuge under section 623(j) of the ADEA. So framed, this is not a controlling question, because it is too early in the lawsuit to determine that this is the *only* type of evidence of subterfuge that the plaintiffs could discover. I ordered the plaintiffs to come forward with any facts, consistent with Fed. Rule Civ. P. 11, to support their allegations of subterfuge in order to determine whether this case was distinguishable from *Kopec v. City of Elmhurst*, 193 F.3d 894 (7th Cir.1999). *See* Minute Order of 3/4/02. I did not convert the motion to one for summary judgment, requiring the plaintiffs to come forward with all of the evidence necessary to make out a claim.

Nonetheless, I am of the opinion that there is a controlling legal question[1]: whether a plaintiff can demonstrate subterfuge under § 623(j)(2) with *any* kind of evidence if there is no violation of § 623(j)(1). This is a pure question of law because it involves the construction of a statutory provision. *See Ahrenholz*, 219 F.3d at 676. It is controlling because I held that the plaintiffs could not make out a claim under § 623(j)(1), and both the ADEA claim and the remaining due process claims of the firefighter plaintiffs depend on the plaintiffs' ability to state a claim under § 623(j)(2). *See* 192 F.Supp.2d at 848. It is contestable because, so far as I can tell, it is a question of first impression.

---

1. 28 U.S.C. § 1292(b) does not require that I accept the City's proposed question for certification. That statute provides that "[w]hen a district judge, in making [an otherwise non-appealable order in a civil case], shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for a difference of opinion . . . , [s]he shall so state in writing in such order."

Appendix B

One other court in this district has considered circumstantial evidence of subterfuge and found a genuine issue of fact precluding summary judgment, but it did not discuss whether the mandatory retirement ordinance complied with the requirements of § 623(j)(1). *See Glennon v. Village of S. Barrington*, No. 00 C 1264, 2002 WL 423681, at *2 (N.D.Ill. Mar. 18, 2002) (Leinenweber, J.). The *Betts/Bell* interpretation of § 623(f) suggests a different outcome, though I find those cases distinguishable. Finally, an immediate appeal promises to speed up the litigation because it defines the proper scope of information, if any, that the parties may seek in discovery. A contrary decision would be dispositive, and would obviate the need for discovery. Although I DENY the motion for reconsideration, I GRANT the motion to amend the order to certify an immediate appeal under 28 U.S.C. § 1292(b).

ENTER ORDER:

s/ Elaine E. Bucklo
United States District Judge

Dated: May 22, 2002

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED MARCH 25, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 01 C 0840

DONALD DRNEK,

Plaintiff,

v.

CITY OF CHICAGO, an Illinois Municipal Corporation,

Defendant.

No. 01 C 2586

JAMES D. MINCH, RICHARD A. GRAF, and **RICHARD COSENTINO**, individually, and on behalf of a class of all individuals who are similarly situated,

Plaintiffs,

v.

CITY OF CHICAGO, an Illinois Municipal Corporation,

Defendant.

Appendix C

MEMORANDUM OPINION AND ORDER

The plaintiffs in these cases are Chicago Police and Fire Department officers who were involuntarily retired under the City of Chicago's mandatory retirement ordinance, Chicago Municipal Code § 2-152-140. Donald Drnek sued the City of Chicago ("City") for violations of the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* ("ADEA"), and for due process violations under federal and Illinois law. James Minch, Richard Graf and Richard Cosentino filed a substantially identical claim on behalf of themselves and others similarly situated.[1] The City moves to dismiss both complaints. I deny the motions as to the ADEA claims in Count I, and grant them in part and deny them in part as to the due process claims in Counts II and III.

I.

The plaintiffs, all former Chicago police officers and firefighters, were terminated on December 31, 2000, pursuant to the City's mandatory retirement ordinance (the "Ordinance"), which establishes sixty-three years as the maximum age for sworn members of the Police Department and for members of the uniformed service of the Fire Department. Chicago Municipal Code ("CMC") § 2-152-140.[2] The City did not give the plaintiffs an

1. The putative class action was originally filed before Judge Norgle, but was reassigned to me based on relatedness. *See* Minute Order of 5/18/01.

2. I may take judicial notice of municipal ordinances on a motion to dismiss without converting the motion to one for summary judgment. *See Menominee Indian Tribe of Wisc. v. Thompson,* 161 F.3d 449, 456 (7th Cir.1998); *Newcomb v. Brennan,* 558 F.2d 825, 829 (7th Cir.1977).

opportunity to take physical fitness tests to demonstrate that they could still meet the fitness requirements of the job.

Ordinarily, under Fed.R.Civ.P. 23, class certification should be addressed before any consideration of the merits, but the ADEA class action is not subject to Rule 23, *see* 29 U.S.C. § 626(b) (incorporating opt-in procedures under 29 U.S.C. § 216); *Tice v. American Airlines, Inc.*, 162 F.3d 966, 973 (7th Cir.1998) (holding that ADEA class actions are "opt-in" actions under § 216(b), not "opt-out" actions subject to Rule 23), so I may address the merits of these claims without resolving class certification. *See Vanskike v. Peters*, 974 F.2d 806, 812-13 (7th Cir.1992) (addressing merits of § 216(b) action before resolving class issues); *see also McCann v. City of Chicago*, No. 89 C 2879, 1990 WL 70415, at *3 (N.D.Ill. May 3, 1990) (Grady, J.). On the due process claims, the plaintiffs have not moved for certification under Rule 23, and the City moved to dismiss on the merits without addressing the propriety of certification, so it has waived the Rule 23(c) protection of certification before a decision on the merits. *See Williams v. Lane*, 129 F.R.D. 636, 647 (N.D.Ill.1990) (Shadur, J.) (Noting that certification prior to the merits protects against "one-way intervention" by class members, and holding that a defendant implicitly waived objection on this basis by seeking a favorable decision on the merits). To the extent that the City objects to the plaintiffs' standing to raise arguments on behalf of other class members, the class issues are not ripe. I therefore address only the claims of the individual plaintiffs.

On a motion to dismiss, I take all well-pleaded factual allegations in the complaint as true and draw all reasonable

inferences in favor of the plaintiffs. *Szumny v. American Gen. Fin., Inc.*, 246 F.3d 1065, 1067 (7th Cir. 2001). I will not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief. *Id.*

II. Age Discrimination

The ADEA makes unlawful the discharge of an individual because of his age, 29 U.S.C. § 623(a)(1), but it contains an exemption for firefighters and law enforcement officers, *id.* at § 623(j). The exemption applies if certain age requirements are met and if the employment action is taken pursuant to a bona fide retirement plan that is not a subterfuge to evade the purposes of the ADEA. To avoid dismissal, therefore, the plaintiffs need only demonstrate that they are entitled to proceed on one of the two theories: the propriety of the age requirements or subterfuge.

The ADEA was enacted in 1967, and at that time it did not apply to employees of state or local government. *Kopec v. City of Elmhurst,* 193 F.3d 894, 896 (7th Cir.1999). On March 2, 1983, the Supreme Court held that the ADEA could be applied to state and local government, *see EEOC v. Wyoming,* 460 U.S. 226 (1983), leaving many state and local laws establishing maximum hiring and retirement ages for firefighters and police officers open to challenge. *See Kopec,* 193 F.3d at 897. To preserve mandatory retirement ordinances, states and municipalities had to demonstrate that they fit into the narrow exception for bona fide occupational qualifications ("BFOQ"). *Id.* In 1986, however, Congress

amended § 623 to allow states to enforce any age restrictions that were in place as of March 3, 1983 (the day after the Supreme Court decided *EEOC v. Wyoming*). *Id.* The amendment had a sunset provision, providing for expiration on December 31, 1993. *Id.* The amendment expired, and Congress took no further action until 1996, when it retroactively reinstated the 1986 amendment with some modifications.

The 1996 amendments[3] say that a mandatory retirement

---

3. The complete text of § 623(j) follows:

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken—

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained—

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(Cont'd)

provision does not violate the ADEA if "the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section." 29 U.S.C. § 623(j)(1). In addition, the employee must have reached either (A) the retirement age in effect on March 3, 1983, or, (B) if the law was enacted after September 30, 1996, the higher of the age provided in the law and age fifty-five. *Id.* Finally, the employment action must be taken "pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of [the ADEA]." *Id.* at (j)(2).

"Section 3(d)(2)" is not a part of the United States Code, but according to the Historical and Statutory Notes to § 623,

(Cont'd)

> (B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or
>
> (ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of—
>
> (I) the age of retirement in effect on the date of such discharge under such law; and
>
> (II) age 55; and
>
> (2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

section 3(d)(2) "probably means" Pub.L. 104-208, Title I, § 101(a), which sets forth a "Study and Guidelines for Performance Test" to be conducted by the Secretary of Health and Human Services ("HHS"). Under Pub. L. 104-208, HHS was to develop and issue, by September 30, 2000, "advisory guidelines for the administration and use of physical and mental fitness tests to measure the ability and competence of law enforcement officers and firefighters to perform the requirements of the [ir] jobs." *Id.* at (c). After issuing the advisory guidelines, HHS was directed to issue regulations identifying appropriate nondiscriminatory job performance tests, *id.* at (d)(1), and "[e]ffective on the date of the regulations described in [subparagraph (d)(1)], any employer seeking such exemption with respect to a firefighter or law enforcement officer who has attained such age shall provide to each firefighter or law enforcement officer who has attained such age an annual opportunity to demonstrate physical and mental fitness by passing a test described in [subparagraph (d)(1)], in order to continue employment." *Id.* at (d)(2). HHS never issued the advisory guidelines or regulations called for by § 3(c) and (d).

The City had a mandatory retirement ordinance as early as 1939, which provided for retirement of "policemen and firemen in the classified civil service." Pl's Ex. B. This version was in effect until 1983, when the Supreme Court decided that the ADEA applied to State and local governments. *EEOC v. Wyoming,* 460 U.S. 226 (1983). In response to the Supreme Court's decision, the City amended its mandatory retirement ordinance, raising the retirement age to 70 and applying to the "career service," which had replaced the classified civil service in 1976. Pl's Ex. C. This

version was in effect until 1988, when the City again amended the ordinance in response to the first "public safety exemption" passed by Congress in 1986. The 1988 version provided that "[e]very sworn member of the police department and every member of the uniformed service of the fire department who has attained the age of 63 years prior to December 31, 1993, shall forthwith and immediately be retired from service." Pl's Ex. D. The ordinance thus mirrored the sunset provision of the 1986 public safety exemption. After December 31, 1993, there was no ordinance that provided for mandatory retirement of police and firefighters until, on May 17, 2000, the City enacted the Ordinance that is the subject of this suit, which sets sixty-three as the maximum age for employment of sworn members of the Police Department and for any member of the uniformed service of the Fire Department. CMC § 2-152- 410(a), (b).

A. Section 623(j)(1): Proper Age Requirements

1. Fitness Tests

The plaintiffs claim that the City violated the ADEA because it discharged them under the Ordinance without affording them an opportunity to prove their fitness for duty by taking the tests described in § 3(d)(2). Although no such tests were ever prescribed by HHS, the plaintiffs claim that the reference to § 3(d)(2) in § 623(j)(1) made performance testing a "first-tier prerequisite to mandatory retirement," and that "the spirit and the letter of Section 623(j)" require an opportunity to prove fitness before mandatory retirement. The plaintiffs cite *Gately v. Massachusetts,* No. CIV. A. 92-13018-MA, 1998 WL 518179 (D. Mass. June 8, 1998), in

support of their argument that the City, like the defendants in *Gately*, ought to have retained an expert to develop tests in order to comply with the statute. But *Gately* was brought under § 623(f)(1) (the BFOQ provision), before the 1996 amendments, so the discussion of § 623(j)(1) as a Congressional endorsement of fitness tests is dictum. I cannot read *Gately*, a case arising under § 623(f)(1), to *require* employers to incur the cost of developing fitness tests to comply with § 623(j), particularly where Congress evidenced an intent in § 3(d)(2) to place that burden on HHS.

Before the expiration of the time for HHS to issue testing regulations, a court in this district examined a mandatory retirement ordinance that provided for the discharge of police officers at age sixty-five "unless 'otherwise demonstrating physical and mental fitness pursuant to regulations to be promulgated by the United States Secretary of Health and Human Services.'" *See Glennon v. Village of S. Barrington*, No. 00 C 1264, 2000 WL 1230494, at *4 (N.D. Ill. Aug. 25, 2000) (Leinenweber, J.). The municipality had not afforded the plaintiff an opportunity to demonstrate his fitness, but the court held that the plaintiff failed to state a claim for a violation of the ADEA on that basis. *Id.* The plaintiff argued that the exemption was void because § (3)(d)(1) states that employers "shall" use performance tests developed by HHS, but "Congress . . . promulgated § 623 without specific fitness tests to go immediately into effect." *Id.* at *4. The court assumed that § 623 was valid because the Seventh Circuit had analyzed several cases under that section and had not questioned its validity. *Id. Glennon* was decided prior to September 30, 2000, so it does not address the situation of what happens when HHS fails altogether to fulfill its mandate

under § 3(d)(2). As far as I can tell, this is an issue of first impression.

Section 623(j)(1), as amended, contains no sunset provision, but it leaves a gap by requiring employers to comply with regulations that have not been promulgated. As a "general rule[,] exceptions to remedial statutes are to be narrowly construed." *EEOC v. Chicago Club*, 86 F.3d 1423, 1433 (7th Cir.1996). The plain language of the statute, the starting point in all statutory interpretation, *United States v. Wagner*, 29 F.3d 264, 266 (7th Cir.1994), merely mandates compliance with § 3(d)(2), so it offers no guidance in discerning Congress' intent. Section 3(d)(2), however, requires an employer to offer a fitness test developed by HHS "[e]ffective on the date of issuance of the [HHS] regulation," and requires an employer to offer tests only after HHS develops them and issues regulations. Section 3(d)(1) says that an employer "shall" use the performance tests developed and issued by the Secretary. One interpretation of § 623, the one rejected in *Glennon*, is that the exemption was void *ab initio* because it required compliance with non-existent regulations. Put another way, § 623(j) says that an employer may discriminate based on age only if it complies with regulations promulgated by HHS, and if no regulations were promulgated, the employer could not comply and therefore could not meet the requirements of the public safety exemption. An alternative construction is that the fitness tests themselves were an exception to the exemption, with which the City had to comply only once regulations were promulgated. That is, because no regulations were ever promulgated, the effective date in § 3(d)(2) from which employers had to offer fitness tests never occurred, so the

City was not in violation of § 3(d)(2) when it failed to offer fitness tests. Because the plain language of § 623 is ambiguous, I turn to the legislative history of the exemption to discern Congress' intent. *See Central States, S.E. and S.W. Areas Pension Fund v. Robinson Cartage Co.*, 55 F.3d 1318, 1323 (7th Cir.1995).

The so-called "public safety exemption," H.R. 849,[4] was

4. An identical version had twice passed in the House but failed in the Senate. The House Report on one of the earlier bills stated that the purpose of the amendment was to permit, but not require, the use of mandatory retirement ages for State and local firefighters and police officers. H.R. Rep. 103-314, 1993 WL 444307 (1993). At the conclusion of its explanation, the report stated that:

> the Committee is opposed to the expiration of the public safety exception to the ADEA and effectively mandating that States and localities adopt physical and mental fitness tests as an alternative to age-based hiring and retirement policies. States and localities may choose to develop such tests and H.R. 2272 allows them to do this. However, given the paucity of knowledge about appropriate performance standards and the great uncertainty about the effectiveness and legality of one or another performance test, Congress should not force every public safety agency to use such tests.
>
> In making the public safety exception to the ADEA permanent, the Committee does not intend to forever close the door on this issue but rather to ensure that when Congress does re-examine this issue, it does so because there [is] . . . significant evidence of reasonable, effective alternatives to age-based policies that do not have an adverse impact on women and minorities.

(Cont'd)

introduced in the House of Representatives on February 7, 1995. 141 Cong. Rec. 3979. Representative Fawell, the sponsor, stated that, although age requirements as job qualifications are rarely justified, the "public safety arena" presents an exception, and he discussed testimony showing that existing physical tests were inadequate to ensure a fit and qualified workforce. *Id.* at 3982. During the floor debates the following month, Representative Fawell stated that the bill directed a federal agency to develop advisory guidelines for fitness tests, but he said "[u]ntil the point that adequate tests are in place however, I feel that the public safety exemption to the ADEA is necessary and that H.R. 849 should be quickly enacted." 141 Cong. Rec. 9491. Representative Owens supported the bill, and said that it "would permanently exempt state and local public safety agencies from the Age Discrimination in Employment Act in order to permit them to consider age in their hiring and retirement policies." *Id.* He also noted that fitness tests in existence at that time tended to discriminate against women and minorities, and that they were not an effective substitute for age limits. *Id.* at 9492. Representative Weldon said that "[f]itness tests are not a valid alternative to age limits," apparently because of the shortcomings of existing tests, and that "[i]n the absence of a valid fitness test, age limits ensure our public safety teams are in peak condition." *Id.* H.R. 849 passed the House on March 28, 1995. *Id.*

(Cont'd)

Id. Thus, the Committee intended that the public safety exemption should apply, without a sunset provision, until a more satisfactory testing alternative became available.

Appendix C

An identical bill, S. 553, was introduced in the Senate on March 14, 1995, by Senator Moseley-Braun. 141 Cong. Rec. 7765. Senator Moseley-Braun emphasized that federal public safety officers were subject to mandatory retirement based on age, and that the amendment would extend a similar exemption to State and local governments. *Id.* She recounted the history of the exemption and noted that the EEOC had failed to fulfill its mandate under the 1986 amendment to develop advisory guidelines and fitness tests. She noted that medical evidence demonstrated that age directly affects an individual's ability to perform the duties of public safety officers. *Id.* at 7766. She also said "you may ask why State and local governments cannot just develop tests to screen out those individuals who may still retain their strength at the age of 60 or 70. However, there is no adequate test that can simulate the conditions that firefighters and police officers face in the line of duty." *Id.*

S. 553 was subsumed by the Omnibus Consolidated Appropriations Act for 1997. During the floor debates on September 30, 1996, Senator Jeffords opposed the amendment and denied that existing tests were inadequate to measure fitness for public safety positions. 142 Cong. Rec. 26658. Senator Moseley-Braun again spoke in favor of the amendment, and again addressed the insufficiency of existing tests as a substitute for mandatory retirement ages. *Id.* at 26722. She noted that the amendment provided for a study of appropriate fitness tests, and said that "[t]he provision also includes an exception to the exemption whereby [the National Institutes of Occupational Safety and Health, an agency of HHS] will identify valid job performance tests and public safety agencies utilizing mandatory retirement ages

will provide public safety officers who have reached retirement age with an annual opportunity to demonstrate their fitness using the [HHS] tests." *Id.* The Omnibus Act, including the amendment to § 623(j), passed on September 30, 1996. Pub.L. 104-208.

The legislative history points toward the second interpretation: that § 623(j) reinstated the public safety exemption from 1986 allowing mandatory age-based retirement, without a sunset provision, but subject to the use of fitness tests *when and if* suitable tests were ever made available by HHS. The supporters expressed skepticism about existing fitness tests, and proposed mandatory retirement as an alternative. Although several legislators noted that the EEOC had failed to comply with the mandate of the 1986 amendments to develop tests, none of the them indicated that the 1996 exemption would expire if HHS failed to fulfill its mandate, and at least one referred to the amendment as "permanent." Thus I conclude that § 623(j) permits the City to enact a mandatory retirement ordinance without offering fitness tests if HHS has not developed appropriate tests.

The plaintiffs argue that this interpretation produces an absurd result that frustrates the purpose of the statute and ignores Congressional endorsement of fitness tests. However, the legislative history suggests that the intent of the amendment was to reinstate an exemption from the ADEA allowing for age-based retirement for public safety officials because fitness tests were unreliable, expensive, and had potential discriminatory effects on women and minorities. The provision in § 623(j)(1) for compliance with § 3(d)(2) merely imposed an obligation on employers to provide tests

when and if suitable tests became available; it did not make tests a condition precedent to the operation of the exemption. Because HHS has not promulgated the regulations called for by the statute, the City could not violate § 623(j)(1) by failing to provide fitness tests before enforcing the Ordinance.

2. Timing and Scope

The 2000 Ordinance covers all "sworn members" of the police department and all members of the "uniformed service" of the fire department, a broader class than the members of the "career service" covered by the ordinance in effect in 1983. The plaintiffs have argued, as support for their allegations of subterfuge, *see* below, that the City impermissibly broadened the scope of the Ordinance beyond its coverage as of March 3, 1983, in violation of § 623(j)(1)(A). *See Roche v. City of Chicago*, 24 F.3d 882, 884 (7th Cir.1994) (holding that, where plaintiff was in class of employees not covered by ordinance in effect on March 3, 1983, § 623(j) exemption was unavailable). However, *Roche* was decided before the 1996 amendments, which permitted mandatory retirement ordinances enacted after September 30, 1996, as long as the age was not lower than fifty-five. *See* § 623(j)(1)(B). The complaint alleges that the Ordinance was enacted on May 17, 2000, and establishes a retirement date of sixty-three. The plaintiffs argue in their surreply that the Ordinance is subject to the March 3, 1983, restriction in § 623(j)(1)(A) because it contains the same age that existed in the mandatory retirement provision in effect on that date. But § 623(j)(1)(B)(ii) provides an alternative[5]

5. Section (j)(1) refers to attainment of the age in subsection (A) "or" (B).

"if applicable State or local law was enacted after September 30, 1996," in which case discharge is lawful if the officer has reached the higher of the age in effect under the new law or 55. Notably, § 623(j)(1)(B)(ii) does not refer to the enactment of a new "age," it says a new "law." The plaintiffs consistently argue that the 2000 Ordinance is different from earlier versions because the scope of coverage is broader. By the plain language of the statute, it is a new law that was enacted after 1996, so it falls within the requirements of § 623(j)(1)(B)(ii), and sixty-three was the age in effect in 1983, *id.* at (j)(1)(B)(ii)(I), so there is no violation based on the broader scope of coverage.

B. Section 623(j)(2): Subterfuge

The plaintiffs argue that the interpretation of § 623(j)(1) given above, allowing municipalities to broaden the scope of mandatory retirement ordinances by enacting new law, renders the "subterfuge" prohibition meaningless, but it is consistent with the statutory scheme if subterfuge means something more than a violation of the age limitations in (j)(1), and I hold that it does. Section 623(j) requires that mandatory retirement of public safety officials meet the requirements of subsection (1) *and* that it be "pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter." § 623(j)(2). "[T]he term 'subterfuge' must be given its ordinary meaning as 'a scheme, plan, strategem, or artifice of evasion.'" *Public Employees Retirement Sys. of Ohio v. Betts,* 492 U.S. 158, 167 (1989).

In *Kopec v. City of Elmhurst,* 193 F.3d 894 (7th Cir.1999), a case involving an age-based hiring criterion, the court noted

that, "[t]o the extent that a hiring plan includes a maximum age of hire, what little case law there is on the subject suggests that the plan will not be considered a 'subterfuge to evade the purposes of [the] Act' so long as the age criterion predates the ADEA (or its extension to the employees of state and local governments)." *Id.* at 901. The City argues that *Kopec* is controlling, and that the Ordinance is presumptively not a subterfuge because it provides for the same age of mandatory retirement as all previous versions of the City's mandatory retirement ordinance, including those that predate the ADEA. This position might seem to find some support in *Kopec,* but not when that opinion is read in its entirety.

After making the observation quoted above, the court in *Kopec* went on to consider the question of subterfuge separately from the age requirements in § (j)(1). There the only question presented on the issue of subterfuge was whether the challenged hiring plan qualified for the exception without "proof that the maximum hiring age amounts to a BFOQ, that is, a requirement 'reasonably necessary to the normal operation' of the city's police force." *Id.* The Seventh Circuit rejected this argument as a matter of law because that reading would collapse the exemption in § (j)(1) into the BFOQ exception in § (f). *Id.* at 902. The Seventh Circuit was not presented with any evidence of subterfuge, so the court affirmed the grant of summary judgment against the plaintiff. Likewise, in *McCann,* on which the City relies, the court dismissed the subterfuge claim because the plaintiffs failed to "allege any facts to support a conclusion that the City amended its ordinance with the intent to circumvent the ADEA." 1990 WL 70415 at *4.

Appendix C

The Ordinance, on its face, states that its purpose is public safety, Pl's Ex. A, and the City argues that any inquiry into subterfuge should end here. However, the plaintiffs allege that the purpose of the Ordinance was not public safety; they claim that, in fact, the "Ordinance was enacted for the purpose of eliminating from the ranks of the Police [and Fire] Department[s] . . . officers who had surpassed 63 years of age so that, among other reasons, the City could promote younger police [and fire] officers within its . . . Department[s]." Drnek Compl. ¶ 17; *see also* Minch Compl. ¶ 23. At oral argument on March 8, 2000, the plaintiffs made additional factual allegations that the City's true purpose was to "make room for young people coming in" to the police and fire departments, citing public statements by the Ordinance's sponsor and by high-ranking City officials.[6]

The City objects that inquiry into the state of mind of the individual aldermen or City officials is irrelevant and immaterial, citing *Pacific Gas Elec. Co. v. State Energy Resources Conservation & Devel. Comm'n,* 461 U.S. 190 (1983), in which the Supreme Court noted, in the context of preemption, that it would "not become embroiled in attempting to ascertain [the state legislature's] true motive." *Id.* at 216. The Court gave two reasons: first, that "inquiry into legislative motive is often an unsatisfactory venture." *Id.* Here the question of whether the Ordinance is indeed a subterfuge is one, ultimately, for the trier of fact, *EEOC v. Home Ins. Co.,* 672 F.2d 252, 262 (2d Cir.1982), and it is not for me to determine whether an inquiry into the City Council's

6. I may consider the plaintiffs' additional factual narration without converting this motion to one for summary judgment. *Forseth v. Village of Sussex,* 199 F.3d 363, 368 (7th Cir.2000).

motives would be an unsatisfactory venture or a revealing expedition. *See Smith v. Cash Store Mgmt., Inc.*, 195 F.3d 325, 327 (7th Cir.1999) (Under Rule 12(b)(6) "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.").

The Court's second reason for disregarding evidence of the state legislature's "true motive," however, is more to the point. Under the preemption analysis in *Pacific Gas*, federal law preempted any state law that regulated nuclear waste disposal for public safety purposes, but did not preempt state regulation of the same activities "for purposes other than protection against radiation hazards." *Id.* at 210. Thus, the question was only whether there was a conceivable non-safety rationale for the state's legislation, *id.* at 213, and the Court needed to look no further than the state statute's statement of purpose, which gave an economic rationale, *id.* at 216. The Court did not prohibit all inquiry into legislative motive; it held only that it was "pointless" in that case in light of the legal standard. *Id.*[7]

---

7. The City also cites two equal protection cases in which the court employed rational basis review of legislation. *See Hearne v. Board of Educ. of the City of Chicago*, 185 F.3d 770, 775 (7th Cir.1999); *Brown v. City of Lake Geneva*, 919 F.2d 1299, 1302 (7th Cir.1990). In both cases, the court rejected the argument that "legislation that otherwise passes the proper level of scrutiny . . . becomes constitutionally defective because one of the reasons the legislators voted for it was to punish those who opposed them during an election campaign." *Hearne*, 185 F.3d at 775. As in *Pacific Gas*, the legislators' motives were disregarded because they were irrelevant in light of the standard, not because such an inquiry is never permissible.

Appendix C

Federal preemption in *Pacific Gas* was a question of law, *id.* at 201, but "subterfuge" under the ADEA is a question of fact, *Home Ins. Co.*, 672 F.2d at 262, and the City's "true motive" matters. In *Betts*, the Supreme Court held that "subterfuge," in the context of a pension benefit section of the ADEA, "connotes a specific 'intent to evade a statutory requirement.' The term thus includes a subjective element. . . ." 492 U.S. at 171 (citations omitted). Thus the intent or desire of aldermen or other City officials is both relevant and material. A subterfuge analysis, like a pretext analysis under a traditional *McDonnell Douglas*-style analysis, necessarily requires the trier of fact to look beyond the defendant's statement of purpose or intent to see whether it is just an excuse or an "artifice of evasion" to cover-up otherwise prohibited conduct.

At oral argument, the City said that the inevitable result of mandatory retirement under § 623(j) is that there is more room to hire and promote younger employees. As a factual matter, this may be true, but it does not follow, as the City suggested during oral argument, that "making room" and other "favorable treatment of younger employees is a necessary component of discharge on the basis of age, which is lawful under the ADEA." Replacement of older employees by younger employees solely on the basis of age is precisely the type of discrimination that the ADEA was enacted to prevent. *See generally Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (Purpose of ADEA was to protect older employees from "inaccurate and stigmatizing stereotypes" that younger employees perform better.); *see also Home Ins. Co.*, 672 F.2d at 262 ("[E]xplicit appeal to [benefit of] the 'young,' " was sufficient to raise question of fact about

defendant's motivation to subvert the purpose of the ADEA). Age-based retirement is tolerated in limited circumstances under § 623(j), but not for the wrong reasons, *i.e.*, not for reasons that are merely a cover-up for the type of ageism prohibited by the ADEA.

The City argues that requiring it to demonstrate that the purpose of the Ordinance is public safety would have the effect of imposing a BFOQ analysis under § 623(j), a result which the Seventh Circuit has forbidden. *See Kopec*, 193 F.3d at 902. This overstates the result. Although it is commonly referred to as the "public safety exemption," § 623(j) does not prescribe the permissible purposes for mandatory retirement ordinances, but it does tell States and municipalities what the impermissible purposes are. It does not matter, therefore, whether age-based mandatory retirement is "reasonably necessary to the normal operation" of the police and fire departments under the BFOQ analysis; what matters is that the City does not use the public safety exemption as a means of achieving goals, such as cleaning house to "give[ ] young guys the opportunity to get promoted and . . . allow removal of deadbeats in the senior ranks,"[8] that are otherwise prohibited by the ADEA. Unlike the standards applied in *Pacific Gas* and the equal protection cases cited by the City, it is not enough that a permissible motive is conceivable; under § 623(j)(2), the wrong motive is fatal, even if a permissible motive can be imagined.

---

8. This statement, offered by the plaintiffs at oral argument, is attributed to Alderman Beavers, the sponsor of the Ordinance, in a February 2, 2000 article in the *Chicago Tribune*.

Appendix C

At oral argument, the plaintiffs provided additional factual narration suggesting that the introduction of the Ordinance was delayed, four years after Congress passed the 1996 amendment, until a close friend of the Mayor retired in 2000 at age 68. In *Kopec,* the Seventh Circuit held that the safe harbor of § 623(j) is available "for *all* States and municipalities that had age limits in place in 1983, not just to those that have chosen to keep restrictions in place in the ensuing years." 193 F.3d 894, 900 (emphasis in original). However, that discussion related only to whether the age requirements in question satisfied the requirements of § 623(j)(1). *Id.* at 900. The plaintiff there did not argue that suspicious timing was evidence of subterfuge, and the court did not address the issue. In fact, suspicious timing of enactment could not have played a role in that case because the city there had not actually reenacted its ordinance at the time of the adverse employment action. *See id.* at 905 (Posner, J., dissenting). Drawing all inferences in favor of the plaintiffs at this juncture, the four-year delay in reenactment and the coincidental retirement of the mayor's friend, if true, could, depending upon what other evidence was presented, warrant an inference that public safety was not a dominant concern for the City.

The plaintiffs also argue that the Ordinance impermissibly expands the scope of its coverage beyond what it was on March 3, 1983 by including a broader class than the members of the "career service" that were covered by the ordinance in effect in 1983. They cite *Roche,* 24 F.3d at 885-86, for the proposition that any ordinance that is broader in scope than the ordinance in effect in 1983 is a subterfuge to evade the ADEA, but *Roche* did not address the question

of subterfuge, and, more importantly, it was decided under the 1986 exemption, which did not contain the provision for new laws that is in the 1996 amendment. *See* 29 U.S.C. § 623(j)(1)(B)(ii).[9] I have already held, because the Ordinance is a new law, that its broader scope does not violate § (j)(1)(B)(ii), and the plaintiffs offer no support for the proposition that action consistent with the requirements of the ADEA, by itself, could support an inference of subterfuge.

Finally, the City argues that the Ordinance cannot be read in isolation, and that it is part of an overall system of retirement benefits that is "bona fide" in the sense that it is a legitimate, benefit-paying retirement system, *see Kopec,* 193 F.3d at 901, and that the whole retirement system is not a subterfuge. However, at least one court has rejected the argument that a "bona fide" plan is *ipso facto* "not a subterfuge," because if "bona fide" and "not a subterfuge" meant the same thing, Congress would have had no reason to use both phrases. *Home Ins. Co.,* 672 F.2d at 260; *see also Kopec,* 193 F.3d at 902 (interpreting § 623(j)(2) to require that a hiring plan be both "bona fide *and* not a subterfuge") (emphasis added). Moreover, a "bona fide" hiring or retirement plan is only one "that is genuine and pursuant to which actual hiring [or retirement] decisions are made," *id.* at 901; to say that a bona fide plan cannot be a subterfuge to evade the purposes of the ADEA requires an inference

---

9. The plaintiffs also cite *Stewart v. City of Chicago,* No. 92 C 4919, 1994 WL 46672 (N.D.Ill. Feb 14, 1994) (Grady, J.), in support of this proposition, but *Stewart* was also decided under the 1986 amendment, so its implicit holding that a violation of § (j)(1) is evidence of subterfuge, *id.* at *4, even if correct under the earlier statute, is not dispositive here.

that the only purpose of the ADEA is orderly payment of retirement benefits, and that is clearly not so. *See Home Ins. Co.*, 672 F.2d at 260. Finally, the City's argument fails logically. If the Ordinance is merely part of the overall system of retirement benefits, and the Ordinance is a subterfuge, then it cannot be that the overall system is not also, at least in part, a subterfuge. The plaintiffs state a claim for a violation of the ADEA under the subterfuge provision of § 623(j)(2).

III. Due Process

To state a Fourteenth Amendment claim for the deprivation of a property interest without due process, the plaintiffs must (1) show that they have a constitutionally protected property interest,[10] and (2) allege that they were deprived of this interest without due process. *Kim Constr. Co., Inc. v. Board of Trustees of Village of Mundelein*, 14 F.3d 1243, 1245 (7th Cir.1994). The City originally argued only that there is no property interest, but after the plaintiffs raised the issue in their response, the City argued that the process provided under the plaintiffs' collective bargaining agreements was adequate. However, the cases that it cites stand only for the proposition that due process *may* be satisfied by procedures in collective bargaining agreements. What procedures were provided for under the agreements in this case and whether they were actually available to the plaintiffs are factual questions that must be resolved in favor

---

10. The existence of a liberty or property interest is a threshold requirement for a due process claim under the Illinois Constitution, *East St. Louis Federation of Teachers v. East St. Louis Sch. Dist. No. 189*, 687 N.E.2d 1050, 1060 (1997), so the analysis is the same for the state and federal claim.

of the plaintiffs for the purposes of this motion, and the City does not argue that the agreements are facially dispositive of this issue, so dismissal on this ground is not proper. Therefore only the existence of a property interest is at issue here.

"Property interests 'are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . .'" *Ledford v. Sullivan,* 105 F.3d 354, 357 (7th Cir.1997). "[F]ederal property interests under the 14th Amendment usually arise from rights created by state statutes, state or municipal regulations or ordinances, and contracts with public entities." *Ulichny v. Merton Cmty. Sch. Dist.*, 249 F.3d 686, 700 (7th Cir.2001). Furthermore, "'property interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, property denotes a broad range of interests that are secured by existing rules or understandings.'" *Id.* (citing *Perry v. Sindermann,* 408 U.S. 593, 601 (1972)).

The City attached portions of the police and firefighters' collective bargaining agreements ("CBA") to its motion to dismiss. Both the police and the firefighters CBAs have been ratified by the Chicago City Council, and although they are not codified in the Municipal Code, they are ordinances of which I may take judicial notice under Fed. R. Evid. 201(d), and I may consider them without converting the motion to one for summary judgment. *See Menominee Indian Tribe,* 161 F.3d at 456; *Newcomb,* 558 F.2d at 829.

Appendix C

A. Firefighters

Section 16.2B of the firefighter's CBA states that "employees shall be disciplined and discharged only for just cause." Pl.'s Ex. J. The plaintiffs argue that nothing in the firefighters' contract suggests that attaining age sixty-three is cause for termination. Section 13.1 of the CBA also states that the City shall not discriminate against any employee covered by the CBA on the basis of age, among other things.[11] Pl.'s Ex. J. Article XIX of the CBA states that ratification of the CBA by the City Council commits the City to enact no subsequent ordinances[12] that would impair the enforcement of any of the CBA's terms. *Id.* Furthermore, Illinois law states that "any collective bargaining contract between a public employer and a labor organization executed pursuant to [the Illinois Public Labor Relations] Act shall supersede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents." 5 ILCS 315/15(b).

Under the CBA, the firefighter plaintiffs had a legally protected interest in continued employment, *see Roman v. United States Postal Serv.*, 821 F.2d 382, 386 (7th Cir.1987) (finding property interest based on collective bargaining

---

11. Section 13.1 states that "[i]n accordance with applicable law, neither the Employer nor the Union shall discriminate against any employee covered by this agreement because of race, creed, color, national origin, sex age, religion or political affiliation."

12. The Ordinance was enacted on May 17, 2000, subsequent to ratification of the CBA on January 14, 1998.

agreement that provided for termination only for "just cause"), and the nondiscrimination provision in the CBA extends that interest to include protection from discharge on the basis of age. For the purposes of this motion, I must take as true the plaintiffs' allegation that they were fired solely because of their age, so they have stated a claim for a deprivation of a property interest.

The plaintiffs' claim to a property right based on the nondiscrimination provision is distinguishable from a mere expectation of fairness. The Seventh Circuit has held that, where a state statute and municipal ordinance guaranteed that civil service promotion examinations would be fair, that guarantee of fairness did not rise to the level of a property interest where there was no underlying entitlement to the promotion itself. *See Bigby v. City of Chicago,* 766 F.2d 1053, 1056-57 (7th Cir.1985); *see also McMenemy v. City of Rochester,* 241 F.3d 279, 287 (2d Cir.2001) ("But because [the plaintiff] had no legitimate claim of entitlement to—and therefore no property interest in— the position to which he aspired, the procedures used to fill that job are immaterial to his due process claim."). Here, however, the promise not to discriminate runs to a job in which the firefighter already has an entitlement, and the promise enhances the existing protection in contemplation of naked age discrimination, which is alleged to have occurred here.

In reply, the City points to § 9.1(C) of the CBA, which states that, in addition to a disciplinary termination for "just cause," a firefighter's employment may be terminated when he "[r]etires or *is retired.*" Reply at 25. The City argues that the "retires *or is retired* " language contemplates mandatory

retirement, but I must view the CBA in its entirety; a "contract is to be interpreted from an examination of the complete document and not an isolated part." *Western Cas. & Sur. Co. v. Brochu*, 475 N.E.2d 872, 876 (1985). The passive "is retired" language must be read as subject either to the provision for disciplinary discharge for "just cause," or to the nondiscrimination clause, if either of those provisions is to be afforded meaning. *See Leahy Realty Corp. v. American Snack Foods Corp.*, 625 N.E.2d 956, 966 (1993) ("Courts should avoid giving an interpretation to a provision that will nullify the clear and unambiguous language of another provision."). Nor is the "in accordance with applicable law" provision in § 13.1 dispositive; I have already concluded that the plaintiffs state a claim for a violation of the ADEA, so they have also stated a claim for a violation of the City's contractual obligation to abide by the law. The firefighter plaintiffs have sufficiently alleged the deprivation of a property interest.

B. Police

The police CBA also contains a nondiscrimination provision, but that provision contains a limitation: "Nothing in this Agreement shall be deemed to preclude the mandatory retirement of any officer upon or after the attainment of age 63." Ex. M, § 10.2. Unlike the firefighters' CBA, then, the nondiscrimination provision here does not create a property interest in employment after age sixty-three. The plaintiffs do not respond to the City's argument that the CBA does not provide a property interest for police officers age sixty-three or older, but argue only that "there can be no doubt that this provision was intended to be enforced in a

lawful manner and without waiving due process." Resp. at 32. There can be no due process violation without a property interest, however, *see Kim Constr. Co.*, 14 F.3d at 1245, and the plaintiffs have not identified any provision of the police CBA that creates such an interest.[13] The plaintiffs argue that "[t]o the extent that the collective bargaining agreements for police officers permitted the City to engage in mandatory retirement, they did not permit the City to use mandatory retirement as a means to engage in arbitrary and capricious age discrimination." Resp. at 32. At best this argument may be construed as saying that both the mandatory retirement ordinance and the police CBA violate the ADEA, but attacking the validity of the CBA does not demonstrate that the intent of the parties to the CBA was to establish a property interest in employment after age sixty-three.

Beyond the CBA, the plaintiffs point to several rules and ordinances, but none of them establishes a protectable property interest in employment after the age of sixty-three. They cite to a district court case about reinstatement for the proposition that certain City personnel rules create a property interest, *see Townsend v. City of Chicago*, No. 87 C 6097, 1988 WL 61162, at *2 (N.D.Ill. June 3, 1988) (Parsons, J.), but they do not identify which specific City rules allegedly create a protected interest here. In any event, the statement in that case that "under these rules all 'permanent' Career Service employees have a property interest in their continued

13. For the same reasons, the plaintiffs' claim that a property interest is created by § 2-74-050(1), which provides that career service employees may only be discharged "consistent with the requirements of due process of law," must fail. No process is due if there is no property interest.

employment" is dictum, because the question there was whether the plaintiff, who had resigned but was placed on a reappointment list had a property interest in prospective employment. *Id.* at *2-3. The case cited by the *Townsend* court for that proposition found the property interest based on a memorandum, and held only that the City rules and ordinances defined the process due. *See Fontano v. City of Chicago,* 820 F.2d 213, 215-16 (7th Cir.1987).

The plaintiffs argue that the City's nondiscrimination ordinance, CMC § 2-74- 080, creates a property interest in employment after age sixty-three because it prohibits discrimination based on age. Unlike the nondiscrimination provision in the firefighter's CBA, which imposes a contractual obligation on the City to obey nondiscrimination laws, the freestanding nondiscrimination ordinance does not come as part of a package of obligations that includes continuing employment. Without a connection to an existing property interest, a promise of nondiscrimination is no more than a mere expectation of fairness. *See Bigby,* 766 F.2d at 1056-57. Even if the plaintiffs could state a claim for a violation of the nondiscrimination ordinance, that standing alone would not create a property interest.

Moreover, the Chicago Commission on Human Relations ("CCHR") has held that the City's Human Rights Ordinance, CMC § 2-160-030,[14] which forbids age discrimination, is superseded by the mandatory retirement Ordinance. *See In the Matter of Minch et al.*, Nos. 01-E-21/44/48 (CCHR Aug. 24, 2001) (slip op.). It held that, to the extent that the two

14. § 2-74-080 incorporates chapter 2-160 by reference.

ordinances conflicted, the mandatory retirement Ordinance, as the more recent and more specific of the two, controlled, and that the only way to read the two ordinances together and give effect to both was to hold that the mandatory retirement Ordinance created an exception to the human rights ordinance. *See id.* at 16. I find this reasoning persuasive, and conclude that because the human rights ordinance has been "amended silently," *id.*, to allow mandatory retirement at age sixty-three, it cannot provide the basis for a property interest.

The same reasoning also applies to the plaintiffs' argument that the municipal code provides procedural protections for discharged police officers. The provision they cite in support of this, CMC § 2-84-030, states that "[n]o officer or employee of the police department in the classified civil service of the city . . . may be removed or discharged, or suspended . . . except for cause upon written charges and after an opportunity to be heard in his own defense by the police board." Read together with the more recent and specific mandatory retirement Ordinance, it cannot create a property interest in employment after age sixty-three. Furthermore, the sentence cited by the plaintiffs appears in a paragraph describing the police board's power to conduct disciplinary hearings. Because there is no allegation that any of the plaintiffs were discharged for disciplinary reasons, this section does not apply here.

Finally, the plaintiffs claim that they have a property interest in their pension benefits because the Illinois constitution guarantees that membership in a pension plan is a contractual relationship, "the benefits of which shall not

be impaired." Ill. Const. Art. XIII, § 5. Specifically, they claim that any purported class members who have not reached minimum vesting in their pensions ("unvested plaintiffs") have a right not to have their benefits reduced by forfeiture of the City's contribution, and that members of the class whose pensions have reached minimum vesting ("vested plaintiffs") have a right not to have their benefits capped by not receiving future annual raises.[15]

The claim as to vested plaintiffs has been rejected by the Illinois Supreme Court. *See Peters v. City of Springfield,* 311 N.E.2d 107, 151-152 (1974). In *Peters,* the City of Springfield enacted an ordinance lowering the mandatory retirement age from sixty-three to sixty. *Id.* at 108. The plaintiffs, three firemen retired under the ordinance, sued, among other reasons, on the ground that the ordinance interfered with their pension rights in violation of Article XIII, § 5. *Id.* at 111. Under the pension plans, firemen over the age of fifty with twenty or more years of service were entitled upon retirement to a monthly pension equal to fifty percent of their annual salary, subject to annual one percent increases up to a maximum of sixty-five percent. *Id.* The plaintiffs, who were vested respectively at fifty-two percent, fifty-eight percent, and sixty-five percent at the time of their retirement, argued that they had a constitutionally protected right to work until they reached sixty-five percent or age sixty-three, whichever was sooner. *Id.* The court noted that because the pension plan was based on salary and length

15. Because the class certification issue has not been presented to me, I address only the claims of the individual plaintiffs, but neither party identifies the vesting status of the named plaintiffs, so I address arguments on behalf of both vested and unvested police officers.

of service, there were many variables that could affect the amount of the pension, including changes in employment status. *Id.* at 112. The City of Springfield and *amicus curiae* (including the City of Chicago) argued that the right to work until a certain age or until maximum vesting was not a "pension benefit" protected by § 5. The court agreed, and held that § 5 "was not intended, and did not serve, to prevent the defendant City from reducing the maximum retirement age, even though the reduction might affect the pensions which plaintiff would ultimately have received." *Id. Peters* is controlling, so neither § 5 nor Illinois pension laws create a protectable interest in employment beyond the age of mandatory retirement. *See also Booth v. Sims,* 193 W.Va. 323, 456 S.E.2d 167, 181-82 (1995) ("Although participation in a government pension system and forbearance in seeking other employment create an employee's contract right to pension benefits under [the state constitution], such participation does *not* create contract rights to government employment."). The plaintiffs do not explain why this rule should not also be applied to any unvested plaintiffs, whose entitlement to benefits under the pension laws is weaker, not stronger.

The plaintiffs acknowledge the holding of the Illinois Supreme Court in *Peters,* but argue that it is "not dispositive" of all of their Illinois due process claims, and that it does not "negate decisions of the Seventh Circuit which acknowledge the existence of protect[a]ble 14th amendment Due Process claims with respect to pension benefits." (Citing *Buttitta v. City of Chicago,* 9 F.3d 1198 (7th Cir.1993)). *Buttitta* involved a plaintiff who had been placed on disability leave, but not terminated, who claimed that the Illinois Pension

Code created a property right to demonstrate his fitness for active duty. *Id.* at 1202. The court construed a section of the Pension Code that provided for transfer of an officer on disability leave between the Pension Board and the Police Department. *See* 40 ILCS 5/156. Noting that "the statute's language is directed primarily toward the prevention of fraudulent disability claims," the court held that " § 5-156 created in police officers a property interest to the extent that police officers who have been disabled may not be deprived of the opportunity to demonstrate their fitness for active duty." *Id.* at 1204. But § 5-156 does not apply here, because the plaintiffs were not on disability leave, and they have identified no similar provision of the Pension Code that would create such interests in the case of mandatory retirement.

The plaintiffs also cite to *Swick v. City of Chicago,* 11 F.3d 85 (7th Cir.1993), for the proposition that the court could "imagine a case in which a period of forced inactivity impeded promotional opportunities or had indirect effects on post-retirement income." But those facts were not presented to the Seventh Circuit, so it never reached the question of whether the plaintiff actually had an entitlement to the lost income and opportunities. If it had reached the question, it would have run into *Peters,* where the Illinois Supreme Court held that such an indirect effect was insufficient to trigger the protections of Illinois law regarding pensions, 311 N.E.2d at 112, and it is state law, not federal law, that creates the property rights protected by the Fourteenth Amendment, *see Ledford,* 105 F.3d at 357. The police plaintiffs have failed to identify a state law that creates an entitlement to due process upon mandatory

retirement at age sixty-three, so they cannot state a claim for a deprivation of due process.

IV.

The City's motion to dismiss is DENIED as to the ADEA claims of all of the plaintiffs. The motion is also DENIED as to the due process claims of the firefighter plaintiffs, Minch and Graf. The motion is GRANTED as to the due process claims of the police plaintiffs, Drnek and Cosentino.

ENTER ORDER:

s/ Elaine E. Bucklo
Elaine E. Bucklo
United States District Judge

Dated: March 25, 2002

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED MAY 5, 2004

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 5, 2004

Before

Hon. RICHARD A. POSNER, *Circuit Judge*

Hon. DANIEL A. MANION, *Circuit Judge*

Hon. ILANA DIAMOND ROVNER, *Circuit Judge*

No. 02-2587

JAMES D. MINCH, RICHARD A. GRAF,
and RICHARD COSENTINO,

Plaintiffs-Appellees,

v.

CITY OF CHICAGO,

Defendant-Appellant.

Appendix D

02-2588

DONALD DRNEK,

Plaintiff-Appellee,

v.

CITY OF CHICAGO,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 01 C 0840 & 01 C 2586

Elaine E. Bucklo, *Judge*.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by plaintiffs-appellees on April 23, 2004, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing with suggestion for rehearing en banc be, and the same is hereby DENIED.